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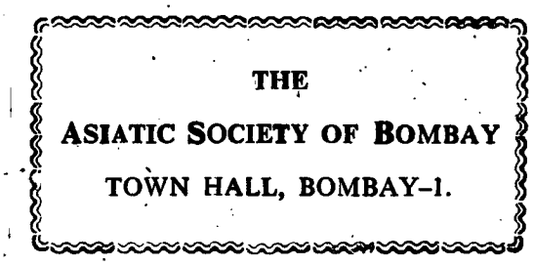

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COMMISSION.

LEGISLATIVE DEPARTMENT.

NOTIFICATIONS.

Fort William, the 11th February, 1879.

No. 6.—WHEREAS it is considered expedient that a Commission should issue to enquire into and consider the provisions of the Bills marginally noted and to report thereon, and to make such suggestions as to the codification of the Substantive Law of British India as may seem desirable, the Governor-General in Council doth hereby authorize and appoint the Hon'ble Whitley Stokes, C.S.I., the Hon'ble Charles Turner, C.I.E., and the Hon'ble Raymond West to be Commissioners for the purposes aforesaid, and, on or before the first day of November, 1879, to report to the Governor General in Council, under their hands and seals, their opinion on the several points herein submitted for their consideration.

The Negotiable Instruments Bill.
The Transfer of Property Bill.
The Alluvion Bill.
The Master and Servants Bill.
The Easements Bill.
The Trusts Bill.

D. FITZPATRICK,
Secretary to the Govt. of India.

Simla, the 9th October, 1879.

No. 22.—WITH reference to the Notification of this Department, No. 6, dated 11th February, 1879, it is hereby notified that the Governor General in Council has been pleased to extend the time therein prescribed for the submission of the Report of the Law Commission to the 1st December, 1879.

D. FITZPATRICK,
Secretary to the Govt. of India.

REPORT.

WE, the Commissioners appointed to enquire into and consider the Bills marginally noted and to report thereon, and to make such suggestions as to the codification of the Substantive Law of British India as may seem desirable, have now the honour to report to the Governor General in Council our opinion as follows:

The Negotiable Instruments Bill.
The Transfer of Property Bill.
The Alluvion Bill.
The Master and Servants Bill.
The Easements Bill.
The Trusts Bill.

I.

In the correspondence extending over several years which has resulted in the appointment of the Commission it has been laid down and repeated that "the question of giving a Civil Code to India was no longer an open one." The only question, one of great practical difficulty, has been as to "the best machinery for carrying on Indian codification." In what precise sense "code" and "codification" have been used, and whether they have always been used in the same sense, is not perhaps quite certain; but for practical purposes the words may be taken, we apprehend, as referring to the systematic legislation resulting in such works as the Succession Act, the Penal Code, and the Codes of Civil and Criminal Procedure. A Code as applied to the laws just named

'means an orderly and systematic arrangement of the rules relating to some well-marked department of the field of jural rights and duties. In its larger sense of a general assemblage of all the laws of a community no attempt has as yet been made in this country to satisfy the conception of a Code. The time for its realization has manifestly not arrived. The rapid changes going on in social relations make it difficult to appreciate the exact extent to which laws of even a limited scope have furthered or retarded progress. The different principles involved in them have not been so wrought out to their final consequences that their ultimate consistency or inconsistency and their relative value can be pronounced on with absolute confidence. When the effects of the special laws have been ascertained by their persistence under varying circumstances, the causes will become apparent by comparison, and the general principles will be established, on the suitability of which to the people and their circumstances it will then be safe to proceed in the work of final consolidation and arrangement. In the meantime, codification in the less ambitious sense may properly proceed in meeting exigencies which daily experience brings to light along with the materials out of which the appropriate fabric may in each case be formed.

2. This, as we understand it, was the general idea of legislation which the Government of India intended to insist on in its letter No. 34, dated 10th May 1877. After pointing out the positive gaps in the system which must needs be filled up, that letter says that the "task of arranging scientifically the various Chapters of the Civil Code thus produced would then remain "

It has been objected that this plan of ultimate scientific arrangement "seems to mix up two radically different ways of looking at law," namely, that which may be called the historical, in that it simply gathers up in orderly synthesis the results of ascertained development, and the abstract, or as it has been called the anti-historical, method, which, taking its stand on the "permanent elements of society and human nature," works out from these "an orderly exposition of fundamental principles," "followed by a statement of all their leading practical applications." We have to confess that we are unable to perceive the inconsistency complained of, or to appreciate the force of the argument adduced in support of the recommendation that, while particular sections of a complete and systematic body of civil law are proceeded with, the notion of their eventual combination in due co-ordination as parts of a single and general Code ought to be abandoned.

3. Although it is necessary, in the circumstances under which Indian legislation is carried on, to deal with the several branches of the law by distinct Acts, yet the ultimate design of forming these Acts into a general Code ought never, in our opinion, to be lost sight of. Every Statute, if it is to be self-consistent and duly proportioned, must be framed with reference to some central group of ideas which dominate the whole work. In constructing a system of laws the same principle should prevail. Although the rule of construing by reference to each other all laws which relate to the same matter does not extend to Statutes relating to different subjects, yet it is obvious that the same principles may be involved in Acts which bear on very different departments of civil rights and duties. The impressions received from a study and application of one branch of the law cannot be cast off in expounding and applying another; nor is it possible that really just and philosophical conceptions of law as an organic structure should gain possession of the minds of the community, or even of the legal profession, unless the minor generalizations embodied in particular laws centre in higher generalizations drawn from the elementary truths of human nature and experience. Unless such a co-ordinating influence is allowed to operate, the development of the law, and the social growth of the community so far as it is affected by the law, must proceed irregularly and disproportionately. In one department a particular set of ideas, which lend themselves readily to the purpose, will obtain an expansion and a predominance which are at the same time gained in another by a different set of ideas. In the course of time and the complications of human affairs the two come into collision. One must give way, and yet neither can do so without litigation, waste of energy, and personal suffering. Nothing less perhaps, than an infallible prescience of events, together with a power and precision of language not yet vouchsafed to man, would enable a legislature to construct a

system of laws involving in all its ramifications no inconsistency or want of adaptation to its intended purposes; but that affords no reason why the inevitable shortcomings should be aggravated by inattention. If a Code cannot be thrown off, as we know it cannot, by one effort of a wise and comprehensive intellect, the alternative system should be brought as nearly as possible to such a production by being animated throughout with a uniform spirit and logical method, securing, so far as may be, an essential harmony amid multitudinous details.

4. It is true that when legislation proceeds by special laws, more complete and minute attention is paid to the detailed provisions called for by the particular circumstances dealt with. But in the practical application of such laws it often becomes evident through the logical development of one set of rules that it has proceeded upon an underlying conception inconsistent with the radical idea or group of ideas involved in another special law. As the relations, then, which have revealed the latent antinomy are likely to arise again and again, it becomes necessary to subjugate the one principle to the other either by formal legislation or by a forced method of interpretation, with the injurious consequences to which we have adverted. In the case of a Code such a result can hardly arise. The leading ideas of legal relation govern the whole, and the development of each part is worked out harmoniously on the same general basis of rights and duties, however they in detail may be modified by the particular kind of activity that has to be enforced or controlled, or the kind of physical objects to which they are directed. Such is the consummation to which legislation pursued in a philosophical spirit must necessarily tend; but in India we have not at hand such materials as those out of which the Roman Code and the modern Codes of Europe were formed. The responses of a long succession of jurisprudents, the commentaries of the legists extending over centuries, are wanting. Society itself, profoundly altered in external conditions, and subjected to the operation of conflicting currents of thought, is in a state of flux, the result of which may differ widely from the course of evolution of modern institutions in Europe from their germs in the dark ages. We must provide not only for permanent needs but for pressing exigencies of the passing time; yet, in proportion as great changes are unsuitable, we ought, so far as we can, to introduce amongst the materials of the future some constant and stable elements, the virtue of which has been proved by the test of time and of manifold experiment; and which it may reasonably be expected will give a tone and character to the whole system in which they are incorporated. Englishmen, indeed, brought up in the midst of influences which give to them so marked and peculiar a political character, will move spontaneously along lines in legislation, as in other fields of action, determined for them in a great measure by their own history and their law. Their general tendency will be pretty uniform; but this should not exclude the careful analysis of all that the past and the present of English law and English ideas offer for our adoption, the conscious selection from the mass of those principles which promise to be most strong, fruitful and beneficient, and the persistent endeavour to give them recognition and a governing influence throughout the fragmentary legislation to which for some time and for some purposes we are confined. The separate laws, being thus controlled, will be in the main consistent and capable at the proper time, without any harsh disturbance of interests, and almost without a perceptible break of continuity, of uniting into a single and well-compacted general Code.

5. These principles, of the highest importance yet too obvious almost for statement, but that they have been called in question by an eminent authority, are, as we think, misrepresented, or at least not correctly presented, by the comparison drawn between legislation and house-building. No one, we suppose, would be so foolish, except in a simile, as to say "I will first build the rooms I want and then devise the ground-plan of the house." What a sensible man, having a reasonable anticipation of his future fortune and necessities with limited present means, would do would be to build room after room as he could afford it according to a plan laid down from the first, but not so immutably fixed as to admit of no adaptation to circumstances. This is the analogy, if any, which we think ought to be drawn; and if, coming closer to the matter in hand, we could suppose the English law to have been fostered and controlled in its earlier

stages by a wide and clear apprehension of general principles, it is impossible to doubt that it would have conferred through many generations greater blessings, at a much less cost, than in fact it has done to the people amongst whom it grew up. The Roman law, being in theory a *jus gentium*, freed so far as its constructors could free it from the narrowing peculiarities of a particular people, has been found more rich in general principles covering a variety of circumstances than the insular product of our own history and character. From the English law, then, we must not take at random, but choose such materials and such models for the structure we have to raise in India as will fit appropriately into a design, however remote in its accomplishment, congruous and symmetrical in the relation of its parts, and adapted, as far as human foresight extends, to the place, to the people, and to their hoped-for share in the general progress of civilized men.

6. We would not have it supposed that in thus vindicating the beneficial effect, and the necessity even, of a constant attention to uniform and expansive general principles in legislation, we in any way underrate the importance of the historical and of the practical elements of the work. The growth of law is always going on. It is the upshot of a contention ever renewed of rival interests and conflicting tendencies of thought. It thus reflects the material and moral growth of the nation. The historical element of existing law as disclosed in actual usage and the decisions of the Courts as well as in special legislation must never, therefore, be disregarded. But by the aid of comparative jurisprudence we may arrive at such clear conceptions of the life, growth and death of legal ideas in the several stages of social and moral progress that we can with a great degree of probability forecast what is already, and will more certainly be, felt as an incumbrance, and remove it. We may determine, at least approximately, what will fit into the general sphere of national thought of which the legal region is but a segment, and introduce it from another system in which it has already been submitted to experiment. We may labour with a fuller consciousness of the general ends to be pursued so as to work parallel to the legislation of the most advanced and prosperous countries. It is of the nature of the human mind and character to be deeply impressed by an orderly development of consequences from received principles, even when that development takes a course different from what unaided instinct and the first rude necessities of practice would have suggested. Thus, by timely legislation, taking just account of existing legal conditions as an outgrowth of the past and a necessary basis of the future, we may save the community many painful experiences, put it into possession of the fruits of others' labours and pains, and hasten by whole generations its entry into the great procession of the nations towards a uniformity of laws founded on uniformity in the conception of right and of the essential elements of human welfare.

7. In attempting to carry out such a scheme it is, perhaps, more difficult to determine, at any given moment, exactly what legal needs exist to be satisfied than to devise the laws which for the time will satisfy them. It is still harder to determine in what precise form and measure an infusion from a foreign system is capable of forming a vital adhesion to the existing body so as to supply an obvious deficiency, or even give a stimulus to its natural growth. The legislature, then, should be in close and appreciative communication with the felt necessities and the active thought of the society for which it is to work. It must be quick to discern permanent tendencies amongst the temporary fluctuations of popular impulse. Without binding itself in the trammels of what has grown effete, it must recognize the existing state of facts as a main element of the structure to be raised, and mould them into a symmetrical fabric with the more universal element drawn from general jurisprudence. Hence a necessity not only for an acquaintance with the contents and the working of past laws, but for a thorough insight into the actual circumstances of the community both in their mutual relation as physical facts and in the way they are conceived by the mind of the people, in the wishes and aims thus generated, and in the moral preparation made by them for the reception of some new development or some new combination of principles. When we see the untiring care and precision with which the grounds of chemical or mechanical science are investigated, and the observations and experiments verified again and again before a fact is admitted finally as the ground-work of a law, a sense

of surprise is awakened at the coarse and slovenly inductions, or the purely *à priori* assumptions, on which the spirit of system is too often content to build in the science of human action. The true use of a system is to co-ordinate the facts, not to neglect or in an arbitrary way to admit or to exclude them. The true purpose of a Code is to further the moral and material progress of a people by fostering a general harmony of thought and action, and by employing all the means afforded by existing conditions for ensuring a future amelioration. There must, then, be exact and sympathetic observation leading to true insight; there must be development; there must also be adoption and appropriation; but all without waste of force, and without neglect of any element which by its unacknowledged presence will set all calculations at fault.

8. In India itself a different set of objections has been raised to any attempt at scientific legislation. Collect, it is said, and group the existing facts of custom and practice, and leave the future wholly to natural development. The answer is that, essential as an exact ascertainment of the facts of the society and of their true relations is to the legislator, a sound theory is just as essential. It is a sound and comprehensive theory which in legal as in physical science alone gives life to the materials which it embraces. Such a theory in any department of human thought can be formed only by careful and continued reflexion on a copious store both of facts and of subsidiary theories by which the facts are viewed and classed according to various methods of arrangement. It implies the exercise of intelligence unbiassed by any predilection except for the truth, a readiness to accept all the teachings of experience, where it points out what is immediately expedient as well as what is permanently necessary. The contempt for theory which is felt by some men of considerable observing powers is, in truth, a contempt for all that makes their observations valuable. They are themselves the slaves, not unfrequently, of partial theories qualified by mere inconsistencies, which can be reconciled only by reference to some higher point of union at which a wider generalization stands ready to reconcile seemingly discordant facts. A mere empirical acquaintance with affairs may become a snare in the presence of new combinations; and in meeting the foreseen difficulties of the future, it is unsafe to yield to the suggestions of unsystematic thought, or of no thought at all, which are dear to indolence, dogmatism and mental impatience.

9. Objections of the kind that we have just been considering have in the last few years been urged so strongly, and even vehemently, in this country against all comprehensive legislation whatever, that we may be pardoned for examining the arguments that have been employed by reference in somewhat more detail to the teachings of history and of social science. It would seem as though a reaction of lassitude had quenched the energies of many distinguished administrators when we find them shrinking from projects which a few years ago they would have heartily welcomed. Legislation generally has for the time become distasteful, scientific legislation a kind of bugbear. It seems to be thought that the effort of grasping the new necessities can be avoided by a simple folding of the hands: it is overlooked that the times of great administrative progress in India have been the times also of great legislative activity. Society, it is in substance asserted, can provide for its jural needs without any intervention of the legislature; and such intervention, being unnecessary, will almost certainly be mischievous. That there is much that is plausible in these arguments cannot be denied; but we believe they have no solid foundation and would hardly have been thought of but for their accordance with the tendency which for the moment is dominant in the minds of their authors. We think that active legislation is essential to the political health of a growing society; that it meets needs which cannot otherwise be satisfied, and that the more systematic it is provided the system itself is a moderately good one, the more beneficial it will be in its operation and influence.

10. A sense of the necessity for fixed laws is one of the earliest sentiments of every settled community. It rests on the constraining influence of habit, a centripetal instinct and the perception of utility according to the dominant notions of the general good. The physical circumstances and the prevailing beliefs of a people form an environment or nidus in which the common tendencies of human nature are developed in a tribal or national form which then

reacts strongly upon the elements from which it sprung. Thus a people's law composed of a universal and an individual element becomes as characteristic as its language. It presents itself in concrete forms the suitability of which is immediately apprehended by the popular consciousness, or which are rather determined by it in the very process of germination. By time and use what was vague and unorganized becomes in a measure fixed and symmetrical. The yet unrecognized working is felt of the instinct of order and system ; a new or unfixed rule of convenience is moulded to a form consistent with the general spirit of the received custom by the influence of association and a sense of congruity ; while the lapse of years surrounds with a sacred halo those earlier laws which are linked with the dim and magnified traditions of the past.

11 As a community advances, the extension of its territory, the separation of employments, the multiplied forms of individual development, enfeeble the common consciousness of legal right which made its earlier law. In the subordinate aggregations which form towns and villages, as in those divisions of the people which compose different classes, a unity of feeling springing from local neighbourhood, similar pursuits or identity of moral tendency still gives birth from a contact with new circumstances to usages whose fitness is recognized, and causes their reception as rules of custom. In the wider sphere of general law the requisite developments have to be effected by scientific evolution from the earlier established principles insensibly modified by the medium in which Courts and jurists work,* or by positive legislation on the part of the sovereign authority. The capacity for a spontaneous development of law in the people wanes as the facts to be regulated grow more complex. A sense of comparative imbecility in the presence of the more definite and palpable embodiment of the public force deprives its law-creative faculty of liveliness and vigour.† The cloudy suggestions which come from this source encounter as to all the great interests of society the clear-cut provisions of a written law. New ideas grow up, new discoveries are made, giving rise to new institutions, fashions and employments. An individualism and independence of action have meanwhile become possible and prevalent which submit to no control less powerful than that of the whole State. It is then the legislature alone which can pronounce the doom of effete laws and perform a work of reconstruction answering to the spirit and the needs of each successive generation.

12. Now this, which is true of communities in general, is in a peculiar degree true of the great community of British India. The apposition at almost every conceivable point of all that is oldest with all that is newest in civilization has produced groupings of fact and jural necessities with which it was impossible that the indigenous law should be able to cope. The legal consciousness of a people bound in the chains of caste and tradition could not develop itself concurrently with the new physical and moral changes brought in by the masterful foreigner. Those only who were familiar with the actual working of the new order of things, though in a different region, could hope to frame laws appropriate to the new world they were creating. The introduction of the English law, or of legislation founded on the English law, into British India may be compared with the general adoption in Europe in the Middle Ages, and especially in Germany of the Roman law, though the rate of change is infinitely faster. In the slowly-won victory of the enlightened classes over the dull persistence of their ignorant countrymen, the diffusion of new ideas and the creation of new wants and new sensibilities produced in the jural sphere a craving for regulations which could not be built up upon the rude framework of Teutonic tradition. The official depositories and mouth-pieces of custom found no formulas quite adapted to the new exigencies, while the Civil law presented in a consistent system plain rules for daily needs, which yet conformed to general principles of the widest application. There was no need to find out through costly failures

* See Maine's Ancient Law, Ch. II, pp. 31-33 (third edition).

† The establishment of the British power in India has been followed by a decline of the village-communities as independent centres of political life, which is sometimes regretted but was plainly inevitable. In providing for the growth of society as a whole, and favouring individual enterprise, the Government had to limit the authority once exercised by the small communities, and once the necessary stay of their corporate existence, but become in the presence of a higher organization a means only of isolation and obstruction. Restricted in its power to enforce rules by the predominating influence of the ubiquitous "sarkár," the village-assembly soon lost the capacity to invent them. It ceased to be an effective organ alike of the public strength and of the public will. This atrophy in its turn necessitated an increased energy on the part of the Government, and centralized legislation took the place of customary law, as it alone could provide for the extended relations springing from a freer and wider-ranging activity.

the way to sound conclusions. The requiste experiment had been made, and the result so expressed as to produce instant conviction. Thus the Roman law took its place beside the Customary law, and in the course of generations went far to supersede it Anomalies in time grew up in this system of double origin. There were inconsistencies of judicial decision and a wilderness of contradictory literature. The Code of Frederick the Great first attempted a thorough-going remedy. The Austrian Code followed; and then the Code Napoléon collecting the opinions of the great legists of France became a model, even in its errors and defects, for half the continent of Europe.

13. We may gather from this retrospect that the influence of English government, of an English mercantile class, of English literature, and acquaintance with English institutions, made the adoption of the English law in its leading principles an inevitable necessity for modern India. The new conditions of social existence raised questions to which the indigenous law gave no answer, or worse than none. Recourse was instinctively had to the law which furnished the requisite solutions and its decisions once admitted in a few cases exacted conformity throughout a wide area to the principles on which they rested in order to prevent obvious and glaring contradictions. The English race could effectively construct—could even imitate—no civilization but the English; and of this the English law is a vital part. Step by step it made its way by occasional direct legislation, by methods of exposition and by the judgments of the Courts in a fragmentary way into every corner of the country. Mufassal munsifs, speaking no language but their vernacular, were told at last by a Chief Justice through their superiors that they were bound to dispose of the litigation of Maráthas according to the principles of Englsh law which the Courts at Westminster would bring to bear on the same cases.* This, which might seem a *reductio ad absurdum* of the assumptions on which the highest Courts of India had for years proceeded, was after all not a mere logical disproof of the premises from which it was inferred. It was but a somewhat premature anticipation of the result to which things were inevitably tending. The earlier and more obvious works of codification—the Criminal Codes and the Code of Civil Procedure—had then already been produced; but it was now demonstrated that a more searching and laborious task must be undertaken. In the new difficulties which were daily arising, the Native judges, cut off by an elaborate education from sympathetic accord with the thought of their own people, ill-read in their own legal literature and thoroughly conscious of the tests by which their abilities would be appraised, would resort for guidance to the English text-books—to them and to judgments of the High Courts steeped thoroughly in English law, as might be expected from judges long familiar with the lore of the reports. By the Appellate judges the decrees of the lower Courts would be approved or condemned, an improved reading of the English law only being substituted for a defective one, and the chain of precedent at every step growing stronger. A system having won acceptance, no individual judge, however enlightened and sensible, could set bounds to its predominance. Even the terms of the English Real Property Law, drawn straight from the feudal system, have become, with all their misleading connotations, a part of the common vocabulary of the Courts.

14. From such an irregular and haphazard mixture of incongruous systems, some kind of order would in time no doubt have been evolved by the Courts. But the time might be a very long one—all the longer on account of the replenishing of the High Courts periodically by barristers sent straight from England, and therefore, however able, strangers necessarily for some time to the special tendencies of thought, and the special ways of confronting facts, proper to the Indian lawyer. Meanwhile, the people would suffer from uncertainty, and the law become a luxury for the rich or a gambling excitement for men on the brink of insolvency. The Legislature was imperatively called on to regulate the new development on a rational appreciation of the principles to be adopted or rejected, of the forms in which they should be grouped and of the proper place of each greater chapter in the general system of law. A Code, in short, had become necessary in order to prevent the endless litigation, the ruinous losses, the manifold embarrassments and the discouragements to traffic

* See 2 Bom. H. C. R. 38 per Couch, C. J.

and enterprise which would attend the slow formation of a complete body of law by the wasteful process of natural selection. The necessity has not diminished with time. On the contrary, such progress as has been made, as it has rested on an assumption of principles drawn directly or by generalization from the English system, has given to those principles a range of influence,—has so imbedded them in the living body of the Indian law—that all further growth of the jural system must in some way conform to them The choice is between the halting and contradictory action of the Courts and of chance usages growing up amongst a miscellaneous population* and the systematic action of the Legislature, taking all appreciable conditions into account and aiming constantly at reducing the law no only to substantial accordance with actual necessities, but to the most simple, consistent and intelligible form.*

15 The work, moreover, must be one of cautious discrimination as well as of organization. The marked characteristic of the English law, in spite of a much larger infusion of the Roman system than our lawyers are, or were, willing to admit, is its insularity, its shrinking from general principles, its bit-by-bit growth on the results of particular cases. This empiricial process has caused our law, no doubt, to grow with our growth, to mirror our history and to fit the peculiar stamp which the national character has received from our antecedents and surroundings. Moreover, a body of decisions has been collected in the reports, greatly outnumbering even the 30,000 *responsa prudentum* which Tribonian and his colleagues compiled at the bidding of the Emperor Justinian. Treated in a really scientific spirit, these decisions should be of inestimable value to the jurist and legislator. They are so many experiments which even in their not infrequent failure are in the highest degree instructive. But it must be said that when read without the aid of wide generalizations, and without the control of dominant notions drawn from the necessary relations of organized society, they may be a clog to progress and a means of almost infinite divergence from the track along which society is destined to move in the coming generations. It needs at times a Mansfield and a Cockburn to break the shackles of precedent, to go back to first principles, and to educe from them results which shall place the law once more abreast of the novel and extended needs of a time when every day brings forth some change.

16. This law, however, so isolated, so special, so indifferent to aught but a practical grasp of the legal relations which a single society presents for discussion, we must of necessity make the basis in a great measure of the law of India. It may serve the purpose; but it is certain that the good will be mixed in a needless degree with evil unless it be used with prudence and sagacity. Those peculiarities which adapt it best to England are in some respects disqualifications in India. From amid the mass of precedents and proximate rules of the practical lawyer, the Indian legislator, if his work is to be beneficial and enduring, must seize the central and governing idea. He must compare it with the results arrived at as to the same class of relations under other systems. If he finds a general accordance between them, he may safely proceed to consider how far the special circumstances of the country and the people for whom he has to legislate admit, repel, or qualify the application of an apparently universal principle. Hindú society has its own laws of unmeasured antiquity. It has its religion closely interwoven with those laws. It has the customs which that religion consecrates and springing fresh from the nature of the people. To ignore these facts is to invite failure. It is a living body that we have to deal with, identical in some respects with others of the same species, but with its individuality and its need for individual treatment as well marked as our own national character.

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* Inaction on the part of the Legislature retards but does not arrest legislation. In the absence of enactments the judge makes law declaring what is the customary law, and what rules regulate rights not governed by customary law.

Beyond his own experience the Judge must look for materials to the suitor who is interested to secure a particular decision rather than the accurate ascertainment of a usage or the establishment of sound principles; who frequently lacks the means requisite to procure such proof as may be available or to retain a competent advocate. In the ascertainment of the customary law, then, the Legislature has ordinarily greater facilities than the Courts. A proposed law is published. Information can be obtained from the best sources and tested by the experience of individual members, who bring to the discussion of the proposed law experience acquired in the different districts of the empire or province. It may happen, but it must happen less frequently than is possible with the imperfect machinery of Courts of justice, that customary law is rejected where it should be recognized, or recognized where proof is inadequate.

In legislating on subjects not governed by customary law, the Legislature has again this advantage over the Courts, that before it arrives at a decision, its proposals are published, and criticism from all parts of the empire invited and weighed.

17. It is true that in the sphere of the criminal law and of procedure successful steps have been taken in legislation, governed to a certain extent by English analogies. But, if scrutinized, these experiments prove rather the necessity of recasting the materials of the English law than the expediency of adopting them undigested, unassayed and unmodified. The grounds of penal legislation are much the same everywhere. Murder, theft, arson, forgery, are essentially identical wherever a possibility of committing them exists. No serious difficulty is found in drawing up parallel tables of equivalent crimes for the purposes of extradition-treaties. Procedure, again, is a merely mechanical process for getting the parties to litigation and their witnesses before the Courts, for securing a fair hearing, and for giving effect to the Court's command. But when we come to the laws of property and of the family, a very different set of considerations presents itself. The dominion of man over external nature, his right over the actions of his neighbour arising from contract, may assume endlessly various forms. His personal relations as a husband, father, brother or caste-fellow are not only susceptible of infinite variation but touch his sensibilities in their tenderest points. In dealing with the substantive private law we place ourselves in the very midst of the actual life of the sentient beings who look to us for furtherance in happiness and prosperity. Every step we take is full of the peril of wounding some unknown susceptibility. The mass of people are incapable of proceeding *per saltum* to a recognition of the ultimate advantages of great changes which at the time jar on their traditional prejudices and reduce them to a state of puzzled uncertainty.

18. If, then, by means of additional laws we wish to contribute a new expansive force to Native society, we should, first of all, free ourselves from the fetters of a too exclusive devotion to our own somewhat narrow legal system. The work to be done calls for a wider survey, for a comparison of systems and a truly philosophical induction. The late Mr. Justice Willes insisted strongly on the advantages of such a method, even for English legislation. He argues for "a really well-considered Code . . . . embodying improvement suggested by a comparison of our own laws with those of other countries," which, as he truly says, "can hardly all be mistaken." When we see how one proposition after another insisted on by the great continental jurists has to force its way after years or generations of controversy into the body of English jurisprudence, we cannot but be struck with the narrowing effect of an almost purely deductive method confining professional genius to a range in no way commensurate with human nature, and obstinately refusing admission to any legal principle which cannot be proved needless by the possibility of referring it directly to something already admitted. When one sees the vehemence with which the continental jurists themselves contest some important points, a further lesson is learned of the limitation even of highly cultivated faculties. What fits the whole scope of expanding human capacities can be determined only by the profound insight of genius; but ordinary intelligence can pronounce with certainty on the insufficiency or unfitness of many rules for any people or any system except those in whose midst they have grown up.

19. How far, and in what form, the particular rules accepted in England are suited to this country and community is thus in every case a question which must be met on grounds, not of mere prejudice or senseless imitation, but according to a just analysis of what is proposed and what are the conditions under which it is to operate. To answer the question aright, something more than mere juristic science must be brought to bear on it. There must be a competent knowledge of the existing written and unwritten law, intimacy with Native habits and modes of thought, a set of associations through which the mind of the inquirer is spontaneously affected with an emotion, or the reflex of an emotion, akin to that which will be on any occasion felt by the ordinary Mussulmán or Hindú. A large degree of this responsive faculty is no doubt sometimes acquired by men of sympathetic temperament in the work of the Courts, but in general it exacts early and familiar relations between the Native and his would-be benefactor; it requires an intercourse kept up in varying positions through several years to enable the European to go outside himself and see how matters look from the purely Native point of view. It may not be right or safe to accept the view thus presented as conclusive; but it cannot be right simply to ignore it. Proceeding on a method of disdain some of our measures may by

chance succeed; many of them must necessarily fail. We work in the dark, and our legislation, being founded on no appreciative insight into the moral nature of the Natives, can never become in its entirety a portion of their intellectual being. Government, as Burke says, is "a practical thing made for the happiness of mankind, not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians"; while the true end of legislation is "to follow, not to force, the public inclination, to give a direction, a form, a technical dress and a specific sanction to the general sense of the community." The experience of the world, the decay of superstitions, enable us now to go back with comparative intellectual freedom to really first principles. In pursuing this course, we come upon springs of thought and action common alike to Hindú, Mussulmán and Christian. At these we should pause and appropriate all they can yield to us; employ the results with frugal skill, and, having thus established the base-line and some of the principal points of our system, leave the development of its details to time, to the sure germination of sound thoughts and to the action of the Courts, continually checked in any tendency to aberration by the constraining influence of great and conspicuous landmarks.

20. The principles, then, which we attempt to introduce in our legislation, and especially in a Code, should be comparatively few, carefully chosen and thoroughly approved. They should be cast in a form as far as possible resembling that of rules already accepted, or appear as the logical outcome of already recognized doctrines.* The new law would thus link itself naturally to the law previously existing, blend with it imperceptibly, and form a basis for a new departure. It is the characteristic of sound and fruitful principles to embrace an ever-widening mass of details within their operation. Contradictory rules and reasonings are either modified or perish before them. Those principles which in themselves are consistent with the elementary facts of human nature are sure as matters progress to be recognized as the proper complement of others already accepted. Thus, from step to step a logically organized system is formed, while by a process of reaction the character of the community itself in which this process is going on is moulded insensibly to a development in which the maximum of its beneficial energy can be put forth in the manifold lines of activity which the law leaves invitingly open in every direction consistent with the common welfare.

21. The leading principles of a Code, such as we have conceived it, would be principles of human nature itself, but principles arrived at by a process of scrupulous comparison. Its propositions should be broad, simple and readily intelligible.† Their remoter consequences should be left to be traced out by judicial interpretation and the play of the popular consciousness. The induction on which they are based should be wide and accurate for the very purpose of avoiding entanglement in the details of subordinate and derivative principles. A Code thus formed will not retard or hamper progress and development: it will afford a new outline to fill up, a new platform to start from, a new impulse to systematic thought. It is conceivable that here and there its rule will constitute a barrier in some direction which otherwise the course of social evolution would have taken; but the slight obstruction thus caused will be as nothing to the positive aid afforded by a well-devised and consistent scheme of fundamental laws. Such a scheme, by the standards it sets up, by the mental standing points which it provides and imposes, contains the most certain and effectual means of its own further amelioration in the future. As the subtilties and complications of human affairs exceed the most sagacious human prevision, it will be found in time that some rules are in effect out of harmony with others. Some will correspond to the spontaneous movement of society and some will not. It may be that those which years before rested on a more specious support of sentiment and reasoning, being in truth the weaker, their inexpediency by degrees come out. The better-founded rules, meanwhile, gain more and more on the convictions of the community; and a sense of the real incongruousness of the two having arisen, the moment has come for revision and excision. Such a process is as inevitable as human work is necessarily imperfect; but a system

* The concrete application of the law should be facilitated by the now familiar aid of illustrations of as simple a character as possible and drawn from actual cases or the incidents of every-day life.

† "Les lois ne doivent point être subtiles: elles sont faites pour des gens de médiocre entendement."—Mont. Esprit des Lois, XXIX, 16.

sound as a whole will meanwhile have done much to form the character and the turn of legal thought which will make reparation easy and natural without any general disturbance.

22. Due regard being had to the considerations on which we have dwelt, it must be admitted that a variety of laws under the same Government is not only an embarrassment to the Courts, but an impediment to intercourse and fruitful activity. The business of merchants, bankers and carriers, pursued under different conditions in different localities, is hampered with difficulties which check enterprise resting on nice calculations and adjustments. The public law ought to be substantially the same throughout the territories under a Government, as otherwise people may expose themselves without knowing, without having reason to know it, to ruinous penalties. When Caste-laws do not restrict intercommunion, uniformity of marriage and family-laws is as obviously desirable. The law relating to immoveable property and its incidents may well admit of considerable variations according to local circumstances. Landed estates are usually collected in one province and subject to one law; but even when this is not so, little or no practical inconvenience arises from a property in Bengal being held on a different tenure from one in Madras. Within the sphere of transactions variable at the will of those who engage in them, it is in the mutually dependent and ever-extending operations of commerce that a need of uniformity of law first becomes apparent; and thus the law of contracts, first in fragmentary sections and then in a systematic collection of general principles, claimed early recognition in the formation of the Indian Code. As society with its desires and needs settles down, in various phases of its being, to an approximately permanent scheme of existence, the tendency to assimilation which in ruder times would have extended identical customs over a wider and wider field appeals to the Government to effect the same objects by legislation. The spirit of the community at large spreads by gradual infiltration through the mass of local peculiarities and subdues them to itself. Change of dwelling-place and sale of land become more frequent; and the necessity is felt of rules for the holding of property and for all common transactions which will best express the average general convictions as to what is beneficial and convenient.

23. By opponents of scientific uniformity in legislation for India we are often reminded of the extremely different social conditions and stages of progress attained in different parts of the country. That very great differences exist is undoubted; but it is in no way conclusive of the question of systematic, as opposed to casual, law-making. Looking at the matter by the light of history, we have to admit that the contrasts in civilization amongst the several provinces of the Roman Empire were not less marked than those to be observed in British India. Yet this was not allowed to prevent the growth and application of a uniform system of legal principles. The prætorian law, in fact, gained largely by its necessary adaptation to the needs of citizens and foreigners alike, and its consequent rejection of all that was specially local and peculiar. Principles of universal application according to the standards then recognized had to be sought out, because it was felt that what was a good reason for a rule to a Roman was sometimes no reason at all to a foreigner, or even to a provincial. It was in this way that the Civil Law gained that character of generality which has given it such an ascendancy on the Continent of Europe. In India analogous conditions must lead to not wholly unlike results. The law to be introduced, or framed out of existing local materials, has always to be tried by the test of its suitability to the varying circumstances of the different provinces. What is insular or cramped either in thought or in expression is thus almost certainly eliminated. The central ideas of the English law are, in such works as the Penal Code and the Contract Act, cleared from the remnants of a lower stage of organization with which, in the English books, and in the English Courts, they are still encumbered, and presented in a simplicity and generality of expression which has re-acted very perceptibly on the ideas of lawyers in England. The more searching analysis forced by his situation on the Indian lawyer and legislator may thus in the end prove highly beneficial both to the science of law, and to its practical application.

24. Still, exceptions must undoubtedly be made in many cases in which it can be seen that what is special and local cannot be made immediately to yield to what is general without a diminution of the people's happiness. In such

cases the question occurs, "Le mal de changer est-il toujours moins grand que le mal de souffrir ?"* and it must receive a reasonable and considerate answer. But even the most backward districts are by degrees drawn within the general circulation of thought and activity. Their people become stamped with much the same intellectual marks as their neighbours. Transactions between them increase in frequency. After a time familiarity and habit have made a removal of anomalies welcome ; and in this way a well-ordered uniformity subdues tract after tract by a perfectly natural process. It is quite possible, indeed, that, in the future, provinces which had few or no definite legal ideas of their own may become, like Gaul in ancient days, remarkable for the completeness and tenacity of their adhesion to the new system. In the mean time, the existence of necessary exceptions in particular districts is no more a reason against a systematic Code in other parts of India, than the operation in Scotland or the Channel Islands of their own laws is a reason against a scientific recension of the law of England.

25. It is not, however, necessary or desirable that a Code, taking it in even its narrower sense of an aggregate of the rules in a particular department of the law, should include chapters or separate statutes on every branch and subsection of the whole subject. As to some of these a change of circumstances, such as the discovery of an entirely new means of utilizing property, the growth or decline of population, or a rapid variation in people's conceptions and sentiments, may make it desirable to await the natural evolution of the new order of ideas. Custom itself in such cases undergoes a silent metamorphosis, which undue urgency would arrest, as it would call in alarm and prejudice to the support of established use and wont, and make reform possible only at the cost of dissatisfaction and resentment. In other cases wholly new institutions, such as railways or Government currency notes, have to find by tentative adjustments their proper place amongst those already existing. Special and temporary legislation, and that only, is properly applicable in such instances. By degrees it is found out how far the change of facts and of ideas necessitates a permanent enlargement or modification of accepted general principles ; and when this has come to pass, the time has arrived for an incorporation of the special law within the general system of the Code. In a well-ordered system a place will be ready for it.

26. A consideration of the first importance in the formation of laws is the character of the machinery by which they will be carried into effect. However well devised they may be in substance to meet the needs of the society for which they are made, yet if they involve theories and ways of regarding the facts they propose to deal with wholly foreign to the conceptions of those who are to apply them, it is inevitable that variations and errors of practice should arise which will largely detract from their success. In order that the administrator should work in the spirit of the legislator, it is necessary that the legislator should first bring himself within the sphere of thought of the administrator. He may enlarge and even transform that sphere by judicious endeavour, but it will not in general admit of sudden expansion or thaumaturgic change. Human stolidity, the force of habit, the faith in professional formulas, the disinclination to analysis of common notions—all these are factors in the problem with which the legislator has to deal. If he is bent rather on practical effect than theoretic excellence, they reconcile him to a slow march, in which his followers may accompany him, as preferable to any flight, however brilliant, in which he will be altogether alone. Thus to make a law in India practically beneficial, account must be taken of the means of professional education,† of the constitution and relations of the several official ranks,

* Mont. Esp. des Lois, XXIX, 18.

† In some provinces necessarily, in others without such apparent necessity, the qualifications for admission to the profession of the law exact little either of technical or general knowledge.

In some provinces, and generally in the Mufassal, except in the cities, where there are law-professorships established by the Government in connexion with a University or Central College, technical education other than self-instruction is not available. The system of apprenticeship is unknown outside the Presidency-towns, nor there always resorted to.

The remuneration of professional assistance is, owing to the poverty of the people generally, meagre ; and pleaders without private means are unable to provide themselves with text-books or reports, if they are sufficiently educated to study them. The judges can count on little assistance from the Mufassal Bar in any case that falls outside the range of their daily experience. The parties, at what is too often to them ruinous expense, are compelled to appeal from Court to Court, and eventually find themselves deprived of justice from the unskilfulness with which their cases have been launched or prosecuted in the Court of first instance. No radical improvement is to be expected in the administration of justice in India until the better education of the Mufassal Bar is secured ; and having regard to the circumstances of the people, the most effective, because to the Bar the least expensive means of securing this result appears to be the extension of codified law.

of the special merits and defects of the administrative class, and the traditions in which they have been trained, as well as of the physical situation, the history and character, of those on whom the law is to operate. Abstract perfection must yield in this as in other ways to the narrowing conditions of actual practice and of work to be done by ordinary officials. This, however, is so far from affording any reason against scientific legislation adapted to eventual consolidation that it supplies an argument in favour of that course. A poor and generally ill-trained class of advocates must derive obvious advantages from the economy and uniformity of method of a well constructed Code. Busy administrators, dealing off-hand with innumerable details, cannot afford the time, even if they have the turn of mind, when a legal question arises, for sifting a particular Act so as to make themselves by a special study masters of what it says and of the spirit in which it has been written. If, however, all the principal Acts are composed on substantially uniform principles and with reference to higher unities towards which those principles converge, much of the official's labour is saved. He becomes himself penetrated by the spirit of the Code, and naturally brings to bear on the construction of every passage a method of interpretation substantially identical with that of the Legislature itself. The consummation is thus furthered, though it may never be quite achieved, of a uniformity of administration giving full effect everywhere to uniformity of law.

27. If, in endeavouring to state the grounds and principles on which, as we think, sectional and eventually general codification should proceed in India, we have been led into undue prolixity, a reason or an excuse may be found in the existence of this time in this country of a strong current of feeling which is opposed to all systematic legislation whatever. Its influence may not improbably be felt even in England, and by some whose interest in this country entitles them to a full statement of the reasons on which we would base systematic legislation; but, without dwelling on any speculation of that kind, it is, we think, highly desirable that in India, and for Indian purposes, a notion to which indolence and arbitrariness incline us to give a too ready welcome should be met, and if possible dissipated. The success of laws depends in some degree everywhere—in India in a special degree—on the spirit in which they are received and administered: and the zeal of the great body of public functionaries will, we believe, be more heartily engaged in giving effect to a legal system when they perceive its solid groundwork and its beneficial aim. A Code framed according to the conceptions we have tried to set forth ought not to fail in either requisite. It involves no preference of conjectural anticipation to that clear apprehension of fact which is the only sure foundation of science. In the sphere of legislation, as in other spheres, true reformation is a process of evolution rather than of revolution. The life of a community, as of an individual, implies continuity and assimilation. Society is a complex aggregate, swayed by inherited tendencies, beliefs and sentiments with respect to family-relations, to neighbourly rights and duties, to liberty and property, which no purely speculative plan of legislation would fit. All this is true and of unspeakable importance; but the same study and experience which establish its truth reveal also the capacity for progress which every community presents, the immense efficiency of co-ordinated action, the power to control, to stimulate and to mould a national character, of a reasonable, just and consistent system of laws.

28. It is not necessary or desirable that the principles of human action and of men's relations, as they appear separately on ultimate analysis, should be the ground of a classification of laws or of the subjects for legislation. If we may resume the comparison to a house, it is plain that in constructing one as well as another, the builder must have regard to the same principles as to strength and applicability of materials, to the same mechanical laws and the same rudiments of design. But a classification of houses—still more of rooms—according to the predominance in them of one or the other of these elements of their construction would be of no service for the ordinary uses of life. For such purposes they are classed according to a set of more obvious external characteristics—their fitness for particular purposes—not because the others are less important, but because habit has taught us to expect a general conformity to a reasonable standard which on occasion we test in the proper way. The classification according to position, shape and fitness brings the objects into connexion

along a more extended line of useful and practical ideas than one according to more abstruse resemblances. So in arranging laws, it is not so much the underlying principles of their construction which should determine their classification as the readiness with which particular series of rules hang together, or group themselves about some central doctrine, by a spontaneous association of ideas. When we use such words as "marriage," "partnership," "insurance," each of them calls up a train of thought more closely connected in fact, than the artificial combination of the infinitely various concrete instances embraced under such a word as "contract" or as "property." The use of method in legislation as in arranging the contents of an existing aggregate of laws, is to aid the true conception and the recollection of the individual rules, and to bring out most forcibly their mutual relations in those respects in which they bear on actual practice. A grouping thus determined has somewhat the same relation to a purely abstract system, such as Austin favoured, as the natural system in botany to the Linnæan system. It takes account of the whole being and attributes of the objects to be dealt with, instead of properties of them, determinable indeed, but not by their determination, bringing sufficiently together those which for the observer have most significance, and thus combining in each species the objects which in their totality are for him most really and closely related.

29. Another observation of some importance with reference to the arrangement of laws is, that the chronological order of their emergence by no means coincides with that which they would occupy either according to the abstract scheme of a speculative jurist, or their co-ordination in a complete system. The practical needs of a society, arising from its moral and physical circumstances, may give rise to an institution at a comparatively early stage of its progress, the logical reasons for which are not disengaged for ages afterwards; while simple and obvious rules spring up in the latest as in the earliest stage to meet by slight adjustment some slight change. Thus Austin's analysis of sovereignty and law followed, not preceded, the practical outgrowth of innumerable institutions logically referrible to the notions thus brought into distinctness; and in the work of practical legislation it would not be possible either to await a final resolution of aggregate right into its irreducible elements, or to make those elements, when ascertained, the basis in their crude individuality of separate jural structures. The facts with which the law has to deal are essentially complex. It must yield, therefore, to the cross-divisions of human affairs, build on organic combinations of primary ideas, and accept great leading principles rather as a permeating influence than as a sole or chief ground of discrimination from each other of the great chapters of a Code.

30. The inference from such considerations as well as from the general practice of mankind is, that neither the purely abstract principles involved in laws, nor their historical relations, however necessary a study of these may be for their full comprehension, and for their scientific reconstruction, afford a safe or convenient basis for their arrangement. The great necessary relations in society which the laws do not create, but only regulate, are those which, combining the largest collections of naturally connected doctrines, suggest the best working plan. The state, moreover, does not and cannot as such come forward in its law-making capacity until society is already formed and tolerably well advanced in a rudimentary civilization. Its very existence as a political power presupposes a community already by common consent submitting in many things to fixed laws. What the sovereign-power, wherever it resides, has under these circumstances to do is, first, to provide for its own continued existence, and next for that of the society, by checking the disruptive force of private violence. The acquisition and devolution of property must already have become subject to customary rules before law in the strictest sense becomes possible. The governing ideas are modified and defined rather than created by legislation. The family in some form must have been coeval with, if not prior to, distinct personal ownership. In its essence it involves a set of relations but very partially amenable to external coercive regulation, but its continuity of existence brings it into connexions with property which at first are recognized and then regulated.

31. In all these cases the State has to deal with relations conforming to regular types of a permanent or at least durable existence, and susceptible of

strict regulation. In the great field of personal obligations the power of legislation as bearing on the essentials is comparatively limited. The natural instinct of freedom asserts itself in making bargains, and there is no interest of the community in general to be served by checking its indulgence. The law here is concerned rather in facilitating than in controlling the action of individuals. But if one fails in the duty he has undertaken to another, the State intervenes, and by force compels him to perform this duty, as it would one directly imposed in the public interest, or else to render an equivalent. The intervention must, however, be called for. No interest of the community is so directly touched that the State should voluntarily step in to repress a breach of contract. Nor is it concerned, without invitation, to enforce redress for the large class of wrongs, ranging from inappreciably petty injuries at one end of the scale up to offences at the other. The public is but remotely interested in the contentions that arise from this source, in which, too, as in cases of contract, the right or wrong is seldom all on one side. The general characteristic of both classes of obligations is that they can be satisfied by a money-payment,—liquidated or unliquidated damages,—if not, then by some stipulated or compensatory act enforceable in a like way, from whichever source the obligation has sprung. Here the connecting link which associates cases otherwise very diverse is the substantial identity of the remedies, as in family-law it is the identity of physical and moral relations, and in the law of property the identical nature of the material objects of men's rights and duties.

32. The law of personal capacity lies rather collateral to, than in any relation of logical antecedence or sequence to, the other great branches of the law. We may regard the impersonated State as either addressing its commands only to persons of particular conditions, as alone conceived able to obey them, or to the whole body of citizens, with following clauses of exception in favour of those deemed incapable of performing the duties imposed on each man in general. In a Code recognizing caste or other distinctions of race or birth as stamping an immutable legal character on every subject from the first, the law of status in this sense, and the legislation determining it, might properly take precedence of other private laws. It would define certain dominant capacities by which the whole operation of the laws of property, family, and obligations would be pervaded and modified at every step. But in a system accepting as a principle the possibility of indefinite changes of personal condition a different set of considerations prevail. We are not met at every turn by an enlarged capacity attending a high caste or a *deminutio capitis* caused by a low caste: capacity for rights and duties presents itself as generally uniform, subject only to particular exceptions requiring special discussion. Thus, physical imbecility due to age or sex, mental, as in the case of lunacy, and disabilities arising from a foreign nationality or domicile, give rise to qualifications for their subjects of the commands and permissions that bear on others. A special extension of personal rights, as in the case of a British-born subject, is anomalous, and, like the exemption of a Native notability from attendance in Court, is best treated perhaps only as a singular provision of the particular law which in each case gives the privilege.

33. The cases of restricted capacity that we have mentioned may obviously in a general system be as well dealt with after as before the laws of property and of obligations. The case of insolvency, in which a man labours under a positive incapacity to pay debts which the law bids him pay, is a case of personal disability which cannot possibly be dealt with in legislation without an assumption of laws of property and obligation already established. Corporations and societies, whether formed for mercantile or for charitable purposes, are significant to the law solely or chiefly as artificial persons capable of holding property subject to special restrictions: the place of the law respecting them should naturally be determined by this consideration. The legal relations of such loose aggregates as the inhabitants of a hamlet, or the Dhers or Mhárs of a village, stand on the border between the political and the private law. Co-ownership and co-liability, solidarity of rights and of obligations, being notions which come into activity as a rule only when the performance of obligations is due, and not really affecting the extent or essence of the rights or duties in themselves, the rules concerning these subjects group themselves most naturally

under the law of obligations. Within the same principle falls the law of partnership.

34. The duties and rights of persons in a quasi-representative character, such as trustees, have reference necessarily in the main to property, and imply laws of property already recognized. The assignee, the incumbrancer, the judgment-creditor, the liquidator, the executor and the administrator have each his peculiar, and for some purposes representative, position. But the legal right or duty devolving on such persons on account of another is not in itself essentially varied by the devolution. It is determined only as to details by the particular law which makes them substitutes, and the law relating to it is united by a stronger association to the law of property or of succession than to the general law of persons. In like manner, the rules investing particular functionaries, unitedly or individually, with special competencies are connected more naturally with the political or public law than with a law of personal capacities. Many offices are regarded in England as freeholds. With these may be compared such groups of rights and duties as belong to a village-astrologer. The holder of such an office has no doubt a special personal position; but it consists in this, that, in consideration of his performing certain duties, he holds property or a right against the property of his fellow-villagers. There is in this no peculiar status, no medium through which the incidence upon him of the law generally is disturbed or varied.

35. Although, then, as men are the subject of all laws, it might seem proper to place the law of persons first in any complete system, yet, looking to the actual needs of society, the rules of the public law are those which must first be established. "*Jus privatum sub tutela juris publici latet,*" as Bacon says; and the higher stages of its development cannot be reached save in the security afforded by fixed and known laws of penal coercion. It was practically indispensable, therefore, that the Indian Government should enact the Penal Code, the Code of Criminal Procedure and the Code of Civil Procedure before reducing to scientific order the branches of the private law which have since engaged its attention. They express the rules according to which the State will exercise its external coercive force; and though the Code of Civil Procedure ought, perhaps, in theory and in a final arrangement, to follow the laws to which it supplies a sanction, yet, as being simply imperative, it rightly stands historically where it does. The substantive law of property and of obligations, though as yet untouched in great part by legislation, was sufficiently understood when the Code was enacted to furnish unwritten rules for the common cases; and to these the procedure could be applied. So, also, could rules of authentication, such as the Registration-laws, and fiscal rules, such as the Acts relating to stamps and court-fees. Limitation may be deemed a part of procedure itself and has called for regulation in a series of Acts. In the same branch of legislation the rules of evidence were summarized in 1855, and more completely by Act I of 1872. Its outline may be deemed completed by the Specific Relief Act, I of 1877.

36. If, now, we should suppose the legislature to proceed from the absolutely imperative rules embraced in the public law to those by which it will enforce duties by remedial interference at the request or suggestion of a person injured, we should look next for a Law of Wrongs. In a complete system, starting from the basis of what acts or abstinences one subject is to be allowed to exact from another, no doubt the laws defining rights and their exercise throughout the whole range to which compulsion is properly applicable would precede a law concerned with the infringement of such rights and the redress of the consequent injuries. But laws in the legislative era are directly concerned with duties, and but indirectly with rights. The practical measure of a right created by Statute is the obligation that this Statute imposes. To some duties there are no corresponding rights in the proper sense of an extension of the power of a private individual over the action of another. The State simply commands that, under given circumstances, a particular duty shall be done on pain of damages or a penalty for default. The notion in such cases of the conduct being properly compulsive, apart from any special engagement, is what links the law affecting them to that of private wrongs in the chapter of absolute duties. For all practical purposes, moreover, each genus of right is well established long before its species are determined and their characteristics finally settled by the

later refinements of legislation. If, then, the legislature says that, apart from any exercise of volition in engaging to do this or that act, each subject shall abstain from particular classes of actions, or under circumstances shall act in particular ways, in which another subject is directly interested, those classes of actions can be easily defined by reference to well-understood rights, although the remotest distinctions of the latter may not yet have been fixed by the positive law. An "earlier Statute deals [with cases] as a genus within which a new species is brought by a subsequent Act," even without an express reference to the earlier, "*ubi enim casus exprimi non poterat . . . . casus omissus habetur pro expresso si similis fuerit ratio.*"* The law of wrongs, then, is theoretically possible and practically eligible as a subject for legislation without waiting for the detailed evolution of the laws of property and contractual obligations. As to the obligations arising from faults and failures of duty, which range from breaches of the law of quasi-contract up to the gravest civil injuries, that law itself must depend on another which defines the wrongs, and the kind of reparation which the law deems proper for each. It happens, here, as in every department, that according to any possible arrangement each class of laws is dovetailed in practice into some other. The real activities of social life are all going on together, and what a moment ago was a consequence has now become a cause in a tangle of interdependence. It is a necessary incident of all consecutive legislation that in earlier Acts there should be an anticipation of the main principles at least of others yet unconstructed.

37. As a matter of fact, the strict law of persons has acquired a definite form and purpose in the Acts relating to minority and the relations connected with it (Act IX of 1875, &c.), in the Lunacy Acts, and in the Naturalization and Extradition Acts, the last two standing on the border-land between personal and public or political law. The Companies Act, X of 1866, deals with the whole class of subjects suggested by its title. Act XX of 1863, removing the subject of temple-management from the domain of public to that of private law, has provided for the constitution of the bodies by whom the endowments are to be held and dealt with. The time for an expansion of this law and for recasting it in its final shape may hardly yet have arrived, though it seems clear that it will shortly need revision. In the department of family-law, marriage and divorce have been provided for by legislation in those sections of the community whose legal circumstances seemed to call for such regulation. Relations with regard to property as affected by marriage are in part determined by the Succession Act, X of 1865. The legal relations of parentage still await regulation, but for the great mass of the population are mingled, like all the family-relations, with religious laws which it would be political sacrilege to touch—a blunder under present conditions of thought and sensibility worse than a crime.† There is a law of guardian and ward, Act XIII of 1874, of very limited application, which may well be revised and extended. As to kinsmanship and its rights and duties—a topic of great importance under the Hindú Law of Inheritance, and of some importance under the Muhammadan law—legislation cannot be thought desirable until a systematic revision of these laws is called for with substantial unanimity by the Native communities themselves. Whenever such a work becomes expedient, Act XXI of 1850, preventing loss of property through loss of caste, and Act XV of 1856, permitting the remarriage of Hindú widows of all castes, will be embraced within further-reaching laws. The daily rule of civil life is disengaging itself by degrees in custom from the purely religious law, and the severance is hastened by the action of Courts working in a plane of thought but partially coincident with that of the Native mind: the growth of ideas in a wholly changed medium must here be awaited, not in any way anticipated. For the sections of the community not subject to the laws of Manu or of Muhammad, or other special personal law, the Succession Act provides a law which, during a trial of fourteen years, has been found well suited to their necessities, so far as can be gathered from the silence of those most interested. In matters not touching the personal law of Hindús, the same Act has been made applicable to them by the Hindú

* Bac. De Augm. B. VIII De Just. Univ. Aph. 20.

† No proposal, we are informed, has been entertained by the Government of India for legislation on the subject which would have the effect of withdrawing it in the case of Natives of this country from the control of their religious or personal laws. Any suggestions to the contrary must have rested on an entire misapprehension of the facts.

Wills Act, XXI of 1870, in the Lower Provinces of Bengal and in the towns of Madras and Bombay. As opportunities arise, it will be well to work on the same principle, by giving definition, regularity and means of authentication, so far as this can be done without causing misconception, to the various transactions which must still be governed as to their substance by rules sacred to those amongst whom they prevail, and not to be hastily moulded to conformity with a wholly alien system. The laws devised for this purpose should, however, stand for some years outside the general system of the Code, to be embraced within it only when time and use have shown with what variations, if any, they may be finally adopted.

38. Laws of the class to which we have just adverted would be instances falling under the principle we have stated of transitory circumstances met by a consciously transitory action of the legislature. To the same class would belong the rules which it may be necessary to enact on the thorny subject of change of personal law or of status attending a change of religion either on the part of the person held in view, or of some other person connected with him. It is a principle of the Hindú law as old as Manu that effect is to be given not only to local custom but to the usages of classes and of families. Under this rule it has been recognized that a Hindu family migrating may adopt the law of its new domicile or retain that of its former home. Primogeniture has been favoured in many cases. Female succession has in some been denied. The anomalies which a family may retain, it may also cast off, by indicating its submission to the general law. It was hardly an extension, therefore, of the existing law when the Privy Council in the great case of *Abraham* v. *Abraham* determined that a convert to Christianity might choose the law by which the devolution of his property should be governed. The High Court of Madras has ruled that a Hindú by his conversion subjects his estate to the operation of the Indian Succession Act (Act X of 1865). It is obvious that there are cases in which, according to the law as thus interpreted, an affected change of religion might be made a means of inflicting grievous wrong. In some districts conversions of Hindús to Muhammadanism are pretty frequent, though only amongst the lower orders. Fishermen on the Western coast oscillate sometimes between Christianity and a Hindúised Muhammadanism. The questions raised by cases such as these cannot, it is plain, be disposed of by the legislature with advertence merely to the single possibility of conversion to Christianity. Christians have become Mussalmáns; Sikhs return sometimes to ordinary Hindúism; and a family once Jains has been found included within the community of the Lingayats. In the confusion of classes and the corruption of creeds, of which some provinces present such strange examples, it may eventually be found expedient to place the law of status as to property and as to succession on a footing wholly unconnected with religious belief or profession wherever the two are not indissolubly united. But for the present, and perhaps for a generation to come, the steps taken towards the solution of this legislative problem should for the most part be local, tentative, and occasional. In the meantime it deserves consideration whether, as regards property wholly at his own disposal, the Native of India, who may under circumstances elect amongst different forms of the Hindú law, ought not to be empowered to place himself under the sway of the Succession Act, and the other general laws of the same class enacted by the legislature.* It seems highly undesirable to make a declaration of a change of faith a condition precedent to admission to an improved law of property and succession; and a public notice duly registered may perhaps be thought a sufficient safeguard against fraud on the part of the one desiring to embrace the benefits of modern legislation.

39. Taking, then, the great divisions of a complete future Code to relate to (1) Public and Political Law, (2) Absolute Rights and Duties, (3) Obligations, (4) Property, (5) Personal Law, (6) Family Law, and (7) Successions, we find that the most marked deficiencies are under heads (2) and (4). For the law of

* Sir Charles Turner observes that a Hindú may by will distribute property wholly at his own disposal in accordance wih the Succession Act, but he doubts whether he can merely by election place himself under a particular form of the Hindú law. He would substitute for this passage the following:—

"It deserves consideration whether, as regards property wholly at its disposal, a family which may by usage place itself under a special form of law, whether Hindú, or any other, might not be empowered to declare that its property shall be governed by the Succession Act and other general laws of the same class enacted by the legislature."

property, judicial investigations, conducted now in a much more enlarged spirit than formerly, are rapidly paving the way to safe and comprehensive legislation; but to strike out into a region not thoroughly pioneered, or to follow the unsafe guidance of the English law, might do infinite harm. The work must be one of time and watchfulness and patience. Meanwhile, should the Bills which we now recommend obtain the approval of the legislature, the positive rules as to rights in the substantive Civil law will have received a considerable development. The Contract Act, with the Acts relating to Negotiable Instruments, to the Transfer of Property, and to Trusts, will have settled the main principles of free bilateral transactions and fiduciary relations. The law as to the estates and interests to which the State will give effect in immoveables cannot as yet be reduced in its whole extent to systematic uniformity; but Alluvion is an important fact, which has daily to be dealt with, and our acquaintance with the broader features of the law of fixed property enables us to pronounce on the expediency of such limitations and extensions of proprietorship as are involved in a reasonable law of Easements. On the frontier-line of contract and family-law we place the Master and Servant Bill, carefully avoiding any aggression beyond what is absolutely necessary on the delicate domain of purely domestic relations. When these Acts or the chief of them have been passed,* we think that the Law of Wrongs, or of absolute private duties and rights, may next most profitably engage the attention of the legislature. This law, standing between the criminal law and the laws of property and obligations, is interwoven with both. It has numerous connexions also with the law of persons and of the family, and even with the law of succession, considering the onerous responsibilities which the latter throws on executors. If, in legislating on the subject, there will be some slight anticipation of rules yet to be precisely formulated, it may be said that there will at least be no presumption of leading principles still to be established. On the other hand, the positive rules as to rights which have already been enacted require, as a complement, a rational law of wrongs. What acts or omissions, under what circumstances, are civil wrongs may be answered generically at least on principles already accepted and embodied in our positive law, and beyond broad general rules it is not expedient to go. Such rules well co-ordinated and not frittered away in transcendental distinctions may, we apprehend, be safely left for minute development in the hands of the judges. The details of life and of social relations differ infinitely in this country from what they are in England, albeit the foundations of morality are in both countries the same: great care therefore should be exercised to avoid giving an arbitrary generality to special or secondary principles of the English system. Within firm and unmistakable outlines ample room should be afforded for the play of individual energy, for the growth of beneficial influences springing from sources within the community itself, and for the plastic force of judges and administrators at once in thorough sympathy with the legislature and thoroughly instructed in the habits, practices and tendencies of the Native community. We are not without hope that a clearly-drawn Code of absolute civil duties, well adapted to the character of the people, may, with the Penal Code and the Contract-law, serve in the course of time as the solid core of a greatly improved scheme of popular ethics. The argument that by knowing their absolute civil rights people will in many instances be led into litigation for the sake of asserting them, though it has been seriously advanced, is hardly worth serious discussion. Its natural conclusion is that all civil laws are an evil; it may be all penal laws too, since, if no one knew that he could obtain redress, no one would complain of any injury. In the one case or in the other the clearer the legal duty becomes, the fewer occasions will there usually be for litigation. Laws are made and administered in the interest of the general wellbeing. No rights should be given by law except those which it is important to maintain; and when the law conforms to this principle, the man may be regarded as a friend to society who, in vindication of his private right, enforces observance of a rule universally beneficial.

* As to the order in which the several Bills should be brought forward, none more convenient suggests itself than that in which we have here mentioned them. The Transfer of Property Bill is probably the most important in the extent of its bearing on the transactions of the people at large, and on that account might claim the first attention of the legislature; but the Negotiable Instruments Bill would probably be passed with greater rapidity, and would in its department be a very useful measure.

40. The Law of Torts, in the scope which we think ought to be given to it as a principal division of a general Code, will exact from its framers a great deal of labour and discrimination. The time to be expended on its preparation, if used with reasonable diligence, ought not to be in any way stinted. The various propositions and rules contained in it should be dwelt on for so long that they may be brought fairly and closely into comparison with the innumerable other jural notions, which will not come at a moment's notice, but present themselves spontaneously in the course of leisurely deliberation. To the legislature at large such a law will supply a subject on which all available experience and acumen may well be expended for a considerable time. Whether, then, any other far-reaching measure should at the same time be in hand may admit of question. We are inclined to think that when a topic of difficulty and great extent, having widely ramified connexions with human affairs and interests, has to be dealt with, the most effective course is to allow the mind for the time to be in a great degree possessed by it. By this, mental activity is not checked, rather stimulated; but all thoughts are for the time weighed with reference to the main and central object of consideration, until a coherent body of ideas has taken form and substance. A comparison of results then brings out the strong and the weak points of each man's conclusions and opinions; superficialities are readily disposed of. And all this care the Law of Torts in an especial degree requires. But if time and thought can be found for other subjects concurrently with this, we would suggest that the scheme set forth in paragraph 7 of the despatch of the Government of India to the Secretary of State, No. 34, dated 10th May, 1877, should be carried to completion. The laws of insurance, of carriers, and of lien are all of considerable importance; and they are to a great extent in the incipient stage in which they can be moulded according to the wisdom of the legislature without individual injury or inconvenience.* Still they do not affect the daily life of the great bulk of the people in any serious degree. No great harm will arise from the postponement of legislation regarding them until the heavier task is done.

41. When the Acts that we have suggested have been passed, the Law of Property in its whole extent will be a fit object of attention.† It is a wide and intricate subject, demanding for its mastery a mind well furnished with general principles, and with ability to grasp and measure details. To predict whether out of the multitudinous interests and rights relating to property which present themselves in India a uniform system of propositions and rules applicable to the whole country, or to a great part of it, can be evolved would be to anticipate the result which can really be reached only by close and prolonged study and observation by specially capable men.‡ In the meantime the work already accomplished by the legislature, united with other deeply reaching influences, must gradually produce great changes in the mental attitude of the people towards a scientific reformation of the law in those respects wherein an amelioration shall seem called for. When a new set of ideas has been received into the popular mind, an older set logically inconsistent may for some time stand side by side with it; but the intellectual ground having been taken away, the hold of superannuated notions by mere association is gradually loosened, and the way is prepared for their modification or complete absorption. As industry and enterprise extend in India, and larger capitals are invested in improvements

* The principal foreign trade of India is carried on with England; the internal trade has been mainly developed by the operations of English or other foreign merchants residing in the Presidency-cities and towns of export, who are familiar with English law. The law of contracts adopted by the legislature and now in force follows closely the English law. These considerations point to the desirability of securing a conformity of the mercantile law of India to the mercantile law of England, provision being made for the preservation of such Native customs as have survived the extension of commerce. To the codification of this branch of the law no objections have been taken.

† This, in its final form, will obviously include the chapters on Alluvion, as a mode of accession, and on Easements, as particular extensions and restrictions of the rights of ownership, which as subjects for practical legislation require immediate attention. Closely connected with these are incorporeal rights, which in India sometimes take peculiar and characteristic forms. The law of boundaries, the rights and duties of neighbouring owners as to delimitations and landmarks, is a topic of practical importance requiring careful investigation. There are many other objects falling under the same general title which it is not necessary to enumerate, and which indeed would in some instances vary in their name and their contents according to the presiding theory ultimately adopted.

‡ Constituted as is the Legislative Department of the Government of India, it appears to promise better results that the Law Member of Council for the time being should (save when legislation is urgently called for on any other subject) select for codification those branches of the law with which he is most familiar. Thus the valuable chapter on Powers drawn by Sir Arthur Hobhouse and included in the earlier editions of the Transfer of Property Bill came from a hand specially skilled. It has been found necessary to lay this aside for the present, but only, as we anticipate, to be resumed when a general sense of its utility and fitness has been developed by the further growth of legal conceptions.

of the land, many existing customs will so palpably be impediments to progress that their extinction will be generally welcomed. Any general law which may be framed for many years to come should be traced on spacious lines avoiding over-interference, while leaving ample room for inevitable change. Such partial improvements as are meanwhile called for may best be made with special reference to local circumstances. For that important branch of the law which relates to landlord and tenant we have made provision, so far as at present seems expedient, by the chapter on Leases in the Transfer of Property Bill.

42. We do not think that at present our suggestions for the extension of general legislation could with advantage or prudence be pushed any further. What Bacon says of cases is equally true of laws themselves,—*Angustia prudentiæ humanæ casus omnes quos tempus reperit non potest capere,* * and the work we have proposed should not be hurried through any premature reaching beyond it to remoter aims and ends. But by the side of constructive legislation we think that a preparation might well be made for a systematic chapter on interpretation. It would be desirable, indeed, that the main propositions of such a chapter should as soon as possible be laid down, at least provisionally, and consistently adhered to throughout the component parts of the future Code. To some extent this principle has been followed; but if once the resolution be adopted of reducing the rules of interpretation to a system, they will of necessity operate forthwith more strongly and uniformly on the legislation of the future. We would not, indeed, be understood as advocating any large introduction of English legal nomenclature into the Indian law. Technical words are seldom quite correctly apprehended by Natives of India: they often have a connotation which leads one into a field of ideas quite foreign to the Indian law; and they are subjected, as time goes on, to explanations and developments in the English Courts which cannot always coincide with the intention of the Indian legislature. These are inconveniences which we would as far as possible guard against. As matters stand at present, the reports of the English Courts, inestimably valuable to the lawyer and the judge if rightly and reasonably used, are not infrequently made a means of upsetting the law in India; and as to the legal vocabulary in particular, a word originally admitted, with reserve as the nearest in sense to some idea for which expression was sought has in after-days sometimes gained an established position and supported fallacious arguments. As the Code is gradually built up, such accidents would have a most mischievous effect; and yet they are almost inevitable, unless they are prevented by interposing a timely check to all ingenuity of perversion. Framed in this spirit, a Code of construction may, we think, be widely beneficial. In modern times, as the freedom of judicial interpretation becomes more restricted, the reaction of the form of the law upon its substance is more extensive and deeper than in ealier days. This is the palpable danger of a complete Code. It fixes the mobile elements of the law at the moment of its creation; it may petrify them and deprive them of their capacity of growth under the care of scientific doctrine at the call of extended needs. The danger reaches its climax when the principles of a foreign system are imposed on a community of different character and habits; and the danger lies very much in the terminology. While, then, our legislature itself takes out the kernel of English judicial wisdom, it must guard against the *lex viva*, the concrete law, becoming a composition of shells and rind. As in the field of physical science every great advance in discovery is attended with some enlargement of general conceptions and some improvement of method, so in the progress of legal development under any system accepting purely rational standards, each step towards perfection involves a recognition of human relations hitherto less clearly seen, or a change of standing point from which new truths come into view. To enable such truths to be widely appropriated, such benefits to be gained with the least incumbering admixture, should be the purpose of a good Code of interpretation. Thus, in the language of Lord Mansfield, "our jurisprudence should be bottomed on plain broad principles, such as not only judges can without difficulty apply to the cases that occur, but as those whose rights are to be decided upon by them can understand;" while, pending the enactment of a Code of interpretation, and even after its enactment, our judges and administrators may well fol-

*De Augm. VIII Aph. 10.

low the maxim of Lord Eldon that, "instead of struggling by little circumstances to take cases out of a general rule, it is more wholesome to struggle not to let little circumstances prevent the application of the general rule." The Digest which has been proposed would hold out too many temptations to the mischievous ingenuity that Lord Eldon condemned. It is needless, as private enterprise has supplied it. If made discriminative, it would be a bad form of legislation. Of Indian judgments, as of books, it may be said "some are to be read only in parts, others to be read but not curiously; and some few to be read wholly and with diligence." In resolving which were good, bad or indifferent, the Government would have to determine what the law was or ought to be; and, having so determined, it had better legislate at once in order to prevent all further contradictions and errors.

43. Regarding the subject of codification and of systematic legislation finally from the purely practical point of view, it is to be observed that we have one supreme and three local legislatures. We have four High Courts, one Chief Court, and several Judicial Commissioners with the powers of High Courts, of which none are bound to accept as binding the rulings of others. To the tribunal of Her Majesty in Council, which alone can constrain the decision of the local Courts of appeal, access is possible only in cases of high pecuniary value and at an expense beyond the reach of the large majority of suitors. Working under the higher Courts of appeal are a number of Judges, European and Native, who in many instances display remarkable ability, but of whom the majority have had but a defective training owing to the conditions under which they have had to work as members of the public service. It is manifestly desirable that Judges of the first instance, by whom so large a proportion of the judicial work of the country is done, should in their often remote and isolated stations receive all the guidance and support that can be afforded them. It is desirable, too, that the superior Courts should be provided with a uniform body of rules applicable to the chief relations of social life, in order that inconsistencies and contradictions of decision may be prevented, and the great difficulty averted which must eventually arise from irreconcileable systems completely established in different parts of the country. A well-framed Code will not only reduce the necessary bulk of law-libraries, but will focus the wisdom and acumen of many learned expositors upon identical points of construction and detailed development. In such a concourse of intelligence the better interpretation, the sounder principle, must prevail; and thus the lower Courts will be trained, not only to a right understanding of particular enactments, but to a rational and effective method of dealing with the whole range of problems set before them.

44. Amongst the many communities which have in recent years recognized the great advantages of codification is that of Lower Canada, where, as in India, a heterogeneous population made it necessary to build on wide and liberal general principles. From the introduction to its Civil Code we borrow an extract with which we conclude this part of our report:—

"Prospectively, the Code promises uniformity of jurisdiction which contributes to diminish litigation, and to add to the security and stability of our civil rights.

It offers great additional means of legal education from which may be expected a higher standard of professional excellence.

It will ensure among the individual members of society a more intimate acquaintance with their civil rights and obligations, tending to increase and facilitate business-relations and to promote the natural welfare of the community. Moreover, as a barrier against the continual inroads of fragmentary legislation, it is an earnest of stability in the law itself.

To this we would add that it is an element in good government that there should be certainty in the rules regulating the conduct of the governed, so far as they are to be held by law accountable for such conduct to the State or to their fellows, in the rules regulating the rights and obligations of property, and in the rules providing remedies for the invasion of rights. Certainty in these rules conduces to the happiness and prosperity of the governed scarcely in a less degree than does their conformity to the highest standard of jurisprudence. 'It matters little what the law is, so that it be settled' may be truly said in all cases in which it is of necessity arbitrary, and many in which it is conventional.

II

We have carefully enquired into and considered the six Bills referred to in the margin: we have also perused the comments on those Bills sent up by the several Local Governments at the request of the Government of India, the criticisms of the same Bills volunteered by Sir James Stephen, and the important paper of Sir Henry Maine; and we are unanimously of opinion that those Bills deal with branches of the law which may properly be codified; that the proposed enactments should extend to the whole of British India; that, except in the case of the Master and Servant Bill, no class of the community should be excluded from their operation; and that, subject to certain modifications which we proceed to suggest, they should all, with the exception of the Easements Bill, be enacted with as little delay as possible. As to the Easements Bill, Mr. Stokes and Sir Charles Turner are of opinion that, with the amendments hereinafter specified, it might become law at once; but Mr. West, being of opinion that the introduction of this measure may, without public detriment, be for a short time postponed, desires not to be finally committed to all the details of the Bill, should further information suggest modifications in them.

1. The Negotiable Instruments Bill.
2. The Transfer of Property Bill.
3. The Alluvion Bill.
4. The Master and Servant Bill.
5. The Easements Bill.
6. The Trusts Bill.

In the following remarks we shall refer to the Bills as printed in the book entitled "*The Six Codifying Bills laid before the Indian Law Commission*, Calcutta, 1879."

1.—THE NEGOTIABLE INSTRUMENTS BILL.

This Bill, originally framed by the late Law Commission, was, as for back as 1867, introduced into the Legislative Council of the Governor General and referred to a Select Committee. Since then it has been redrawn by Mr. Phillips of the Calcutta Bar—it has received copious and valuable criticism from the Local Governments, the High Courts and the Chambers of Commerce in the presidency-towns and Rangoon, and it has been carefully revised by a Select Committee comprising the Advocate General of Bengal, Mr. Evans of the Calcutta Bar, and Mr. Morgan, a leading Calcutta merchant. We have found little or nothing to change in the Bill (*a*); but we think that certain additions, which we proceed to specify, may usefully be made to it.

Chapter I: Preliminary.—Section 1, paragraph 2, saves, in our opinion rightly, local usages relating to hundis and other instruments in an oriental language. But in order to facilitate the assimilation of the practice of Native shroffs to that of European merchants, we recommend the insertion of a proviso that such usages may be excluded by any words in the body of the instrument indicating an intention that the legal relations of the parties shall be governed by the proposed Act. An eminent critic of the Bill says that he "cannot see why uniformity of practice is desirable." The reason is that it prevents uncertainty and litigation, and facilitates dealings, not only between English and Native merchants, but between Native merchants in different parts of India. The practical working of a system of credit is made safer and more beneficial when the bills of exchange under which a banker or merchant is responsible are governed by precisely the same legal conditions as those on which he is a creditor and with reference to which the others were issued or accepted.

We think that a definition of "signed" may usefully be added. Sir Charles Turner suggests the following: '"signed" means having the name of the person whose signature is by this Act required written by such person or by an agent authorized in that behalf, or indicated by a mark intended by such person as his signature, or impressed by a stamp or seal when a stamp or seal is commonly used by such person for such purpose.'

Chapter II: Of Notes, Bills and Cheques.—To sections 4, 5, explanations shewing when an undertaking to pay is 'unconditional,' when the sum payable

(*a*) There is a misprint in Section 90, line 5, where 'drawers' should be 'drawees,' and another in Section 125, line 7, where 'from' should be 'for.'

is 'certain,' and when the payee is a 'certain person' should, we think, be added. They might run thus :—

"A promise or order to pay out of a specified fund is 'conditional'; but an undertaking to pay in terms absolute is not rendered 'conditional' by a declaration that provision for the payment will be made out of a specified fund.

A promise or order to pay is not 'conditional' by reason of the time for payment being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

The sum payable may be "certain," although it includes future interest payable at a rate specified according to an indicated rate of exchange, or is expressed to be payable according to the course of exchange, or by instalments (if such instalments are declared to fall due on fixed dates), and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due.

The person to whom payment is to be made may be a 'certain person,' although he is misnamed or designated by description only, or though it be directed that payment be made to one or to another of several persons, if it appears on the face of the instrument that there is community of interest between them.

In a bill of exchange the person to whom it is clear that the direction is given is a 'certain person,' although he may be misnamed or designated by description only. If an address only is given, and the person residing at such address accepts the direction, the uncertainty is cured. The direction may be given to a 'certain person,' though it be given to one or other of several persons".

Section 8.—Before 'parties,' the words 'maker or' seem wanted.

Section 18 might be extended so as to meet cases of error not uncommon in Native documents purporting to specify the sum, its half and the double of the half. It might run thus :—

"18. Where the sum undertaken or ordered to be paid is differently stated in the body of the instrument and on the face of, but outside the body of, the instrument, the sum stated in the body of the instrument is the sum undertaken or ordered to be paid.

"Where the sum is in the body of the instrument stated differently in figures and in words, the sum stated in words is the sum undertaken or ordered to be paid.

"Where the sum is in the body of the instrument more than once stated in words and differently, the less sum is the sum undertaken or ordered to be paid."

Sections 19 should, we think, provide also for undated instruments. The requisite clause might run thus : 'A promissory note, bill of exchange or cheque, in which the date of making or drawing is not specified, takes effect from the date of the first negociation thereof.

Sections 21 *and* 23.—In the former section, after the word "acceptance" we would introduce the words "or noting for non-acceptance;" in the latter line 7, after the word "sight" the words "or noted for non-acceptance."

Chapter III: *Parties to Notes, Bills and Cheques.*—*Section* 33 : The statement of the obligations of the drawee of a cheque is not complete. After the word "must" we think there should be introduced the words "unless he has received notice that the drawee is dead or has been declared insolvent, or declared by the proper authority of unsound mind and incapable of managing his affairs;" and the following proviso should be added : "Provided that the drawee is not so liable, unless such funds have been in his hands for a sufficient time before the presentation of the cheque for payment to enable him to ascertain the state of accounts between him and the drawer."

Section 34.—For the first nine words we would substitute "subject to the other provisions of this Act," and omit the final paragraph.

Section 35.—For "all or some of several joint drawees" we would substitute "all or some or one of several drawees." We suggest that in some part of the Bill, and possibly here, a clause should be inserted showing that, to determine who is liable as an acceptor, the address to the drawee and the acceptance should be read together. We would also insert clauses showing that there may be a valid acceptance before the bill is signed or while it is otherwise incomplete, or after it is overdue : that an acceptance is invalid if the acceptor undertakes to comply with the request otherwise than by payment of money : that an acceptance may be qualified in certain specified cases. The case where the drawee is the same person as the drawer or a fictitious person should also be provided for. These clauses might run as follows :—

Time when acceptance may be made. "A bill of exchange may be accepted—

(*a*) before it has been signed by the drawer or when it is otherwise incomplete ;

(*b*) after it is overdue ;
(*c*) after it has been dishonoured by a previous refusal to accept or by non-payment.

Acceptance when invalid.

"An acceptance is invalid if the acceptor undertakes to comply with the direction otherwise than by payment of money.

Acceptance unqualified or qualified.

"An acceptance may be unqualified or qualified.

"An acceptance is unqualified where the drawee, or, where there are several joint drawees, all of them, assent without qualification to the order of the drawer.

"An acceptance is qualified—

(*a*) where it is conditional, declaring the payment to be dependent on the happening of an event therein stated ;
(*b*) where it undertakes the payment of part only of the sum ordered to be paid ;
(*c*) where no place of payment being specified on the order, it undertakes the payment at a specified place and not otherwise or elsewhere ; or where, a place of payment being specified in the order, it undertakes the payment at some other place and not otherwise or elsewhere ;
(*d*) where it undertakes the payment at a time other than that at which under the order it would be legally due ;
(*e*) where it is made by one or more of several joint drawees, not being partners, and not by all.

"If the drawer and drawee of a bill of exchange be the same person, or the drawee be a fictitious person, the holder may at his option treat the instrument as a promissory note or a bill of exchange."

Where the drawee is the same person as the drawer or a fictitious person.

Sections 47 *and* 48.—We would redraw these sections thus :—

47. A negotiable instrument made, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

48. Any person who, being liable as a party to a negotiable instrument to pay the amount due thereon, pays the same, may recover such amount from any party to such instrument prior to himself and to a transferee for consideration, or to himself as such a transferee.

Chapter IV: Of Negotiation.—Though the subject of delivery of negotiable instruments is to some extent treated in sections 8 and 14 and chapter IV, we would prefix to the sections dealing with negotiation clauses relating to delivery generally, and to the following effect :—

"The making, acceptance or indorsement of a promissory note, bill of exchange or cheque is completed by delivery, actual or constructive.*

As between parties standing in immediate relation, delivery to be effetual must be made by the party making, accepting or indorsing the instrument, or by a person authorized by him in that behalf.

As between such parties and any holder of the instrument other than a holder in due course, it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

A promissory note, bill of exchange or cheque payable to bearer is negotiable by the delivery thereof.

A promissory note, bill of exchange or cheque payable to order is negotiable by the holder by indorsement and delivery thereof."

Section 60.—The rule declared in this section is incomplete. We would substitute "appearing to be due on " for the word "of" after "amount," and add : "but where such amount has been partly paid, a note to that effect may be indorsed on the instrument and the instrument negotiated for the balance."

Section 65.—Sir Charles Turner would substitute the following :—

"65. The holder of a bill of exchange payable after sight or after demand must negotiate it within a reasonable time, or present it for acceptance.

In order to charge any party thereto, a bill of exchange payable after sight or after demand, or containing a direction to that effect, must be presented for acceptance, unless such presentment has been excused by the party sought to be charged therewith.

Any other bill of exchange may be presented for acceptance.

Presentment for acceptance must be made to the drawee or to some person authorized on his behalf to accept or refuse acceptance (if after reasonable search the drawee or such per-

* Sir C. Turner would here explain 'delivery' as "the transfer of possession, actual or constructive, by the party making, accepting or indorsing an instrument with the intention of accepting the liability of a maker, acceptor or indorser as the case may be."

son can be found) within a reasonable time after the bill is drawn and in business-hours on a business-day.

Explanation.—In determining what is a reasonable time for the negotiation or presentment of a bill for acceptance, regard must be had to the nature of the instrument, the usage of trade with regard to similar instruments, and the circumstances of the particular case, looking to the interests of the holder as well as of the drawee.

If default is made in the due presentment for acceptance of a bill of exchange payable after sight or after demand, or containing a direction that it should be presented for acceptance, no party thereto except the drawee or a party who has excused such presentment is liable on the bill: Provided that, if a competent drawee or a person authorized to accept on his behalf, cannot after reasonable search be found, the bill is dishonoured.

Section 66.—The words "if he can, after reasonable search, be found" should apparently be inserted in line 2, after "sight."

Section 67.—For this section Sir C. Turner would substitute the following:—

"67. The drawee of a bill of exchange presented to him for acceptance, may require that it be delivered to him, and may retain it for twenty-four hours, exclusive of public holidays, to consider if he will accept it. After the expiry of the twenty-four hours, he must re-deliver it to the person by whom or on whose behalf it was presented, whether he has accepted it or not.

Mr. Stokes and Mr. West would merely substitute for 'may' in line 1, the words "must if so required by the drawee."

Section 78.—Mr. West thinks that the drawer of a negotiable instrument payable on demand ought not to be subjected to risk through unreasonable delay on the part of successive holders in presenting it for payment. Unreasonable delay by parties subsequent ought, he thinks, to excuse prior parties from liability when such delay appears on the instrument.

Section. 80.—We would add to clause (*a*) the words "as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment." Mr. West thinks that this engagement ought not to give the person bound by it any recourse under section 48 against prior parties.

Section. 83.—We would strike out "and" in the fourth line, and insert "due thereon." [The amount may not be claimable in full (sections 49 and 50), or it may have been in part paid.] We would insert "of the principal-money" after "amount" in line 3. We would then substitute "such" for "the" in line 5, and strike out "due thereon."

Similarly, in section 84, we would substitute "due thereon" for "thereof" in line 2.

Section 85.—It would be useful to insert a section to the effect that a cheque satisfied by payment is the property of the drawer, but may be retained by the drawee till accounts are settled between him and the drawer.

Chapter VII:—Of discharge from liability.—We would here insert a section:—

"If a bill of exchange which has been negotiated is at or after maturity held by the acceptor in his own right, all rights of action thereon are extinguished."

Section 87.—After the words "twenty-four hours" there should be introduced "exclusive of public holidays."

Section 88.—After "payment," in line 2, there should be introduced "within a reasonable time."

Section 90.—We would either add to this section as it stands the words "unless on notice given by the holder they assent to the acceptance" or substitute the following:—

"90. If the holder of a bill acquiesce in a qualified acceptance thereof, he is bound to give notice of such acceptance to the other parties to the bill: any party to whom he omits to give notice is discharged."

Chapter VIII:—Notice of dishonour.—To section 94 there should be added, after the first paragraph:—"or where presentment is excused and the bill is not accepted"; and in the second paragraph, after the word "contract," there should be introduced the words "or the acceptance is qualified".

Section 94.—Mr. West thinks that presentment excused should be equivalent to actual presentment, only against the person excusing it; but that an impossibility of presentment, as in the case of an absconding or fictitious drawee, should rank as dishonour.

Chapter X: Of reasonable time.—Sir Charles Turner would omit section 108, leaving the rule as stated in section 107. The section as it stands is, in his opinion, inconsistent with section 107, and declares a rule which is not only far more strict than the existing law, but would be highly inconvenient. Bills are often negotiated before presentation for acceptance. Cheques need not be presented on the day after they come to the holder's possession; and negotiable instruments payable on demand are frequently given as a continuing security.

Chapter XI: Acceptance and payment for honour.—The Bill contains no statement of the procedure in the case of acceptance *supra protest*. It appears to us desirable that the law of India should in this respect be assimilated to mercantile law elsewhere and to the practice obtaining in this country. We therefore recommend that the following clause be inserted :—

"An acceptor *supra protest* must personally appear before a notary public with witnesses, and declare that he accepts, under protest, the protested bill for the honour of the drawer or of a particular indorser whom he names, or generally for honour, and that he will satisfy the same at the appointed time; and then must subscribe the bill with his own hand."

Unless the person who intends to accept *supra protest* first declares in the presence of a notary that he does it for honour, and has such declaration duly recorded in the notarial register at the time, his acceptance shall be a nullity."

Section 111 should, we think, run as follows :—

"When a bill of exchange has been noted or protested for non-acceptance or for better security, any person, not being a party already liable thereon, may, with the consent of the holder, accept the same for the honour of any party."

And for section 112 we would substitute the following :—

"*Section* 112.—A person desiring to accept for honour must in the presence of a notary public subscribe the bill with his own hand, and declare that he accepts under protest the protested bill for the honour of the drawer or of a particular indorser whom he names, or generally for honour; and such declaration must be recorded by the notary in his register. Where the acceptance does not express for whose honour it is made, it shall be deemed to be made for the honour of the drawer."

How acceptance for honour must be made.

Chapter XIV: Of Foreign Bills.—Although in practice inland bills are not generally drawn in sets, they may be so drawn; and in this country, where the postal service is in parts necessarily performed with unavoidable insecurity, we think it desirable it should appear in the beginning of the Bill that inland bills may be drawn in sets. In the Commissioners' Bill it does so appear.

We would alter the heading of this chapter, and transfer section 128 to chapter XI, and section 129 to chapter IX.

Section 126.—The Exception to this section does not go far enough. If an acceptor has accepted one of the parts of a set, payment of another part which he has not accepted will not discharge him from liability to pay a holder in due course of the accepted part. Again, not only is the indorser who has indorsed two parts to different persons, but indorsers subsequent to him of the part not paid, are liable to holders of such part in due course. In the Exception, for the last thirteen words, we would therefore substitute "he and the indorsers of each part are liable on such part as if it were a separate bill."

Section 128.—A referee in case of need may be named in an inland as well as in a foreign bill of exchange, and as well by an indorser as by a drawer. When a referee is so named in an inland bill of exchange by an indorser, presentment to the referee is optional. In foreign bills it is compulsory, in order to charge the person who has given the reference and all subsequent indorsers.

A referee in case of need may accept and pay without previous protest according to Chitty (120) (see also Chalmers, Art. 37, note). We would as we have said, carry this section into Chapter XI, with some additions. We would head that chapter, "Of acceptance and payment for honour and reference in case of need."

The definition "drawee in case of need" should be amended as follows—

"When in the bill or in any endorsement thereon the name, etc.,"

and section 128 should run—

"Where a drawee in case of need is named in a bill of exchange or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee."

We would add a section: "A drawee in case of need may accept and pay the bill of exchange without previous protest."

Mr. West thinks the Bill ought to contain a section embodying the principle stated in *Maillard* v. *Page*, L. R. 5 Ex. 312, 319, that an acceptance and any accompanying written contract are, as between the immediate parties, to be construed together.

We think that the second clause of section 125 (as to the non-liability of a banker who has received payment for a customer of a crossed cheque) should be amended in accordance with the views of Grove and Lindley, JJ., in *Matthiessen* v. *London and County Banking Company*, 48 L. J. C. P. 529, by omitting the first word "but."

As to the arrangement of the Bill, we would suggest that the provisions in sections 26 and 103 as to presumptions, and those in sections 42, 43, and 44 as to estoppels, might better be placed together in a separate chapter headed "Special Rules of Evidence." Section 31 should, apparently, follow section 35: section 48 should precede section 47; and some other slight alterations in the arrangement may be found desirable.

2.—THE TRANSFER OF PROPERTY BILL.

Recognizing in this Bill, which was originally drawn by the late Law Commission and has since been repeatedly revised, the most important of the measures laid before us, we have devoted to it perhaps an undue share of the limited time at our command.

Although it has been objected to the Bill that it deals with subjects which at a later stage of the work of codification will have to be arranged under separate chapters, it has appeared to us convenient to retain for the present in a great measure the form in which it was originally drafted.

Dealing generally with the transfer of property, its arrangement enables the legislature to determine to what general principles the law of transfer should conform, and to apply such principles consistently.

Read with the Contract Act, this Bill covers almost the whole of the ground which could be profitably occupied by law relating to the transfer *inter vivos* of interests in property; and for the convenience of the practitioner it could hardly be enacted in a more accessible form.

This, it appears to us, justifies the introductory chapter, which after declaring what rights are inalienable and by what persons transfers may be made, proceeds to declare restrictions of the transfer of property called for in the interests of society. These restrictions are identical with those which are already incorporated into the law of India in the Succession Act.

In considering the necessity for these provisions, it must not be forgotten that the number of domiciled Europeans and Eurasians holding property in India has of late years greatly increased, and that the value of the property held by them in plantations of tea and coffee, in mills and machinery and in other investments, now amounts to many millions of pounds sterling. These persons and their estates are subject to the law of succession (Act X of 1865), and it would be obviously inconsistent that they should possess powers of creating estates in their property by transfers *inter vivos* which the legislature has declared they should not enjoy by testamentary disposition. Moreover, where the declared law is silent on the subject in respect of transfers *inter vivos*, the Courts may, and probably would consider themselves bound to, recognize principles stamped with the assent of the legislature as conclusive of the question that transfers *inter vivos* creating estates in violation of these principles are invalid as opposed to public policy.

The Privy Council has already ruled that estates cannot be created by Hindús in contravention of the principles which underlie the Thellusson Act, or subject to conditions which are void for repugancy.

The rules contained in sections 10 to 35 impugn, so far as our experience goes, no law or practice of Hindús, Muhammadans or other sects recognized in India as enjoying special personal laws, unless it may be the now obsolete practice among Muhammadans of devoting property to the maintenance of the

family of a particular saint. But to avoid any disturbance of rights enjoyed under personal laws, sufficient provision is made in the Bill.

The persons to whom the provisions we are now considering will in practice be found mainly applicable are property-holders who have been designated in former Acts as "persons to whom the English law applies," a phrase which gave rise to no little difficulty in the case of persons holding property in the mufassal. This class has now attained sufficient importance in numbers and wealth to demand at the hands of the legislature an explicit declaration of restrictions which may be imposed on their dealings with their property, and where these restrictions are founded on approved principles and not inconsistent with personal law, there is no reason why they should not be declared of general application.

The sections from 36 to 53 embody rules already applied in the Courts of India, or flowing naturally from accepted principles.

The rules relating to sales, mortgages, exchanges and gifts declare generally no more than is understood and applied as law in the Courts. The exceptions will be noticed in our detailed observations.

Chapter I: Preliminary.—We would expressly save, in section 2, transfers by decree or order of Courts of competent jurisdiction.

In the interpretation-clause (section 3) we would insert definitions of "ownership," "and property;" we would extend the definition of "attached to the earth" so as to include trees and shrubs; and with reference to sections 40, 56, 78, 79 and 80 of the Bill as we have revised it, we would define "notice" as follows:—

"A person is said to have 'notice' of a fact when he actually knows that fact, or when but for wilful abstention from inquiry which he ought to have made or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, section 229."

We would declare that all chapters and sections of the Bill which relate to contracts should be taken as part of the Contract Act, 1872. When the body of substantive civil law enacted for India is rearranged in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the legislature,* the chapters on Sale, Mortgage, Lease and Exchange, contained in the present Bill, will probably be placed in close connection with the rules contained in the Contract Act. But till then they may fitly be left in a law containing what the Contract Act does not contain, *viz.*, general rules regulating the transmission of property between living persons.

Chapter II: Of Transfers of Immoveable Property.—We think that chapter II should be extended to transfers of property, whether moveable or immoveable; that it should be entitled "*Of Transfers of Property by act of Parties*"; and that it should commence with two sections,—one defining "transfer," the other shewing what may be transferred. The latter section should, we think, to some extent follow the analogy of the Code of Civil Procedure, section 266, clauses (*e*), (*g*), (*h*) and (*k*), as to property which may be attached. We also think that this chapter should contain a section declaring that a transfer may be made without writing in every case in which a writing is not expressly required by law.

The Law Commissioners, by whom the original draft of this Bill was framed, observed that their chief object was to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution upon death, and thus to furnish the necessary complement of the work which they commenced in framing the law of Succession. With this view they inserted rules that conditions in restraint of alienation should be void; that conditions making an interest to cease on insol-

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* This, we understand, is all that was intended by the Government of India in paragraph 18 of its Legislative despatch No. 34, dated 10th May, 1877, by the phrase "scientifically arranging the various chapters of the Civil Code thus produced", and some such rearrangement was contemplated by the late Indian Law Commissioners, who observe in their Sixth Report, referring to their rules relating to the transfer of property: "It is probable that several of these rules will eventually find a different place whenever a final distribution and rearrangement of the whole law shall have been effected; but some blending of subjects is unavoidable in a work which the Government has, for sufficient reasons, instructed us to submit to it in portions, as each portion is completed."

† In view of the more general prohibition that no transfer can be made which is opposed to the nature of the interest affected therby, Sir Charles Turner thinks it unnecessary to declare that "a strictly personal right," &c., cannot be transferred.

vency or attempted alienation should also be void ; that restrictions should be placed on the power of tying up property by transactions *inter vivos*, similar to those imposed by the Indian Succession Act, sections 100 to 104, in the case of wills. They also proposed rules as to when certain interests created by transactions *inter vivos* should be deemed vested. And they applied, *mutatis mutandis* to transfers the rules of the Succession Act as to contingent bequests, conditional bequests and bequests with directions as to application and enjoyment. It seems to us that, subject to the following remarks, these rules are in themselves reasonable, and may properly be extended to the transactions *inter vivos* of all the inhabitants of India, whether they are or are not subject to the Succession Act. But as to the rule corresponding with section 100 of the Succession Act, Sir Charles Turner and Mr. West think that the law should be modified so as not to exclude the unborn beneficiary in the case supposed, but to make void any limitation beyond his interest. As to the rule corresponding with section 102 of the Succession Act, they think that, where distinct interests are given to persons as members of a class, which interests are ascertainable within the term prescribed by the rule against perpetuity, those interests should not fail by reason of other interests failing through the operation of that rule ; and as to the rule corresponding with section 103 of the Succession Act, they think that, where an intermediate interest fails, the subsequent interest should not fail if it is ascertained and vested immediately on the death of the specified persons who were living at the time of the transferor's death. Mr. Stokes is averse to making any of the modifications thus suggested. As to the rule prohibiting accumulation, we all should prefer the more liberal enactments of the Thellusson Act (39 & 40 Geo. III, c. 98), which allow an accumulation for twenty-one years, and do not affect provisions for payment of debts or for raising portions.* But as the rule embodied in the Succession Act, section 104, has now been in force for fourteen years, Mr. Stokes and Mr. West do not press its alteration. The Law Commissioners also proposed to extend to transactions *inter vivos* the rules as to election contained in Part XXVII of the Succession Act. We think that these rules also, founded as they are on principles of equity which are universally applicable, may also properly be inserted in the Bill.

We think provision should be made for the satisfaction of a right arising in favour of several persons, where, in consequence of a transfer, property is divided, and held in several shares ; and we have framed a section with this object. Mr. West is of opinion that a corresponding rule is necessary for the case of a division of the property burdened with an obligation, and that the rules should apply in all cases of legal division.

Section 7 of the Bill treats of the title which the transferor of immoveable property can confer, and of the protection given to innocent transferees for value. We think that this matter should be dealt with in more detail, and have accordingly framed sections in substitution, providing for each of the following five cases :—

(1) where there is a transfer for consideration by a person, such as a Hindú widow, authorized only under circumstances in their nature variable to dispose of immoveable property ;

(2) where a third person has a right to receive maintenance from the profits of immoveable property and such right does not amount to a charge ;

(3) where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another, a right to restrain the enjoyment of the latter property ;

(4) where a third person is entitled to the benefit of an obligation arising out of a contract and annexed to the ownership of immoveable property, but not amounting to an interest or easement ; and

(5) where a person holds immoveable property as its ostensible owner with the consent of the other persons interested therein.

We recommend, too, that the Bill should here provide for the following cases :—

(*a*) where a person, erroneously representing that he is authorized to

* Sir Charles Turner would also urge that these enactments are frequently required by the circumstances of large zamindari properties.

transfer certain immoveable property, assumes to transfer it for consideration and afterwards acquires an interest therein;

(*b*) where a transfer of immoveable property is made for consideration by persons having distinct interests therein;

(*c*) where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors;

(*d*) where a person creates, by transfer at different times, rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together. Mr. West thinks that the rule dealing with this case should be supplemented by a rule providing for the satisfaction of each later created interest to the fullest extent compatible with the rule of priority and for such adjustments as may further this object.

It seems to us that a clause resembling Act XI of 1855, section 2, which provides, in cases to which the English law is applicable, for improvements of immoveable property made by *bonâ fide* transferees who are subsequently evicted, may fitly be introduced into the Bill and applied to all persons in British India. We think, too, that such transferees should be allowed to remove growing crops which they have planted or sown on the property.

We think that the section (10) relating to transfers of land *pendente lite* should not forbid such transfers when made under the authority of the Court and on such terms as it may impose, and that the section (10A) relating to fraudulent transfers may properly be extended to cases of fraudulent forfeitures and to cases where the persons defrauded are co-owners or creditors.

Chapter III: *Of Sales of Immoveable Property.*—We think that "sale" should be defined as a transfer of ownership in exchange for a price paid or promised, or part-paid and part-promised. We entirely agree with Sir Henry Maine as to the desirability of rendering the system of transfer of immoveable property a system of public transfer. But we must remember that, in the absence of a much larger number of registration-offices that at present exist in India, the requirement of registration in the case of every petty transaction relating to land would be an intolerable hardship. We have in this matter been guided by the analogy of the Indian Registration Act (III of 1877, section 17), and required that sale should be made in the case of immoveable property of the value of Rs. 100 and upwards only, by a registered assurance, but that, in the case of immoveable property of a less value, it may be made either by registered assurance or by delivery of the property. As to delivery, we think it will be enough to say that it takes place, in the case of a reversion or other intangible thing, when the parties consent to the delivery: and in the case of other immoveable property, when the seller places the buyer, or such person as he directs, in possession of the property.

The rights and liabilities of the seller and buyer may, we think, be conveniently classified as follows:—(*a*) duties of seller; (*b*) rights of seller; (*c*) duties of buyer; (*d*) rights of buyer, and according to that phase in each case which is the more prominent in practice. In addition to the duties which the Bill (section 12) imposes on the seller, and which are generally recognized by the Courts, we think that, when the property is, or forms part of, a revenue-paying estate, he should be bound to present an application to the proper officer for the requisite alteration of the revenue-register;* that between the date of the contract of sale and the delivery of the property, he should take due care of the property and the title-deeds in his possession; that, on being so required, he should give the buyer, or such person as he directs, such possession of the property as its nature admits, and that he should pay all public charges and rent accrued due in respect of the property up to the date of sale. As to his duty regarding incumbrances on the property sold, we conceive that it will be in accordance with what is generally understood to be the law throughout India merely to require the seller, in the absence of a contract to the contrary, to pay the interest due on the date of sale, and, where the property is sold free from incumbrances, to discharge all incumbrances thereon then existing. As to the implied contracts of a seller, we think it will be enough to provide that

* In practice (according to Sir Charles Turner) the consideration-money is hardly ever fully paid until the seller has presented such an application.

he shall be deemed to contract that the interest which he assumes to transfer to the buyer subsists, and that he has power to transfer the same: provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract to the like effect so far only as his knowledge extends.

As to the buyer's duties, we would require him, in addition to the duties expressly imposed by the Bill (sections 12, 15, 16), to pay or tender, at the time and place of completing the transfer, the purchase-money to the seller or such person as he directs. Power to retain out of the purchase-money the amount of the incumbrances should, we think, be given to the buyer only when the property is sold free of incumbrances. We would expressly require the buyer to re-transfer the property when the ownership thereof has passed to him before payment of the purchase-money, and he fails to pay or tender it. We also think that, where the ownership of the property has passed to the buyer, he should, as between himself and the seller, be expressly bound to pay all public charges which may become due in respect of the property, the principal money due on the incumbrances subject to which the property is sold, and the interest thereon afterwards accuring due.

Chapter IV: Mortgages of Immoveable Property and Charges.—The objection raised by one eminent critic, that this chapter deals "with matters which do not transfer property, but only create a charge upon it" is one which seems to us to rest on an assumption that a transfer must of necessity extend to the whole property or interest of the transferor in the subject-matter of the transaction. We, considering ownership as generally divisible, have regarded the term "transfer" as properly applicable to any interest carved out of the aggregate called "ownership." This is consistent with the English law. "A security," says Mr. Fisher in his work on Mortgages, "is a redeemable estate or right which one person has in the property of another."

We think that the definitions of the four chief kinds of mortgage with which this chapter commences, and which were taken from Mr. Macpherson's well-known work, require some modification to adapt them to the various parts of India. Mr. West is of opinion that the words 'without delivering possession' in the definition of 'mortgage by conditional sale' are not essential, and are opposed to a common practice in the Bombay Presidency. Sir Charles Turner considers that transfer of possession is not of the essence of such mortgages, although they are very generally combined with transfer of possession and usufructuary provisions.

We are of opinion that writing and registration should be compulsory whenever the principal-money secured is one hundred rupees and upwards: when the principal is less than that sum and the property is not delivered, we would also require registration; and in all such cases we think the mortgagor, on payment of the amount remaining due, should be entitled to require the mortgagee to register an acknowledgment that any right in derogation of the interest transferred to him has been extinguished. The requirement of registration will not only discourage fraud and facilitate investigations of title, it will also preclude some difficult questions as to priority.

Mr. West would introduce a provision in the section treating of the right to redeem, to the effect that, if the time fixed for repayment of the mortgage-money has been allowed to pass, or if no time has been fixed, the mortgagee should be entitled to reasonable notice before payment. Mr. Stokes and Sir C. Turner are opposed to this provision as unsuited to India. In mortgages for considerable sums the parties would sufficiently protect themselves: in the far more numerous cases of mortgages for small sums to saukárs, it would be inconvenient to require notice.

We think that a person interested in a share only of the mortgaged property should be entitled to redeem his own share only where the mortgagee, or, if there are several mortgagees, all of them, has or have acquired a share in the right to redeem.

The section (61) of the revised draft, declaring the right of an usufructuary mortgagor to recover possession, should, in Sir Charles Turner's opinion, enable him to do so—

where the profits are to be applied in payment of interest at a rate agreed or prescribed by law and then in reduction of principal—when the mortgagor pays or tenders

to the mortgagee, or deposits in Court as hereinafter provided, the sum then due thereon;

where the profits are to be taken in lieu of interest and no time is specified for redemption; or where the profits are to be so taken and the mortgage is made for a term of years, but it was not the intention of the parties that redemption should be postponed to the expiry of the term—when the sum then due on the mortgage is paid, tendered or deposited as aforesaid;

where the profits are to be taken in lieu of interest and the mortgage is made for a term, and it was the intention of the parties that redemption should not be allowed before the expiry of the term—when, after the expiry of the term, the sum then due on the mortgage is paid, tendered or deposited as aforesaid.

Explanation.—It is not necessarily to be concluded from the circumstance that a mortgage is expressed to be made for a term of years that it was the intention of the parties that redemption should not be allowed before the expiry of the term. The contrary intention may be declared by, or inferred from, other stipulations of the contract.

The case where accessions to mortgaged property have been acquired at the cost of the mortgagee should, we think, be provided for.

As the law stands there is no implied contract on the part of the borrower to produce a security of any particular degree of safety, or any particular title, as in the case of a contract for sale. The implied contracts of the mortgagor should, therefore, in our opinion, be that the interest which he assumes to transfer subsists, and that he has power to transfer the same; that the mortgagor will defend, or, if the mortgagee is in possession, enable him to defend, the mortgagor's title to the mortgaged property; that where the mortgage is a second or subsequent incumbrance, the mortgagor will pay the interest accruing due on each prior incumbrance and at the proper time discharge the principal due thereon. There should also be, in the case of mortgaged leasehold, the stipulations specified in the Bill (section 24) as to payment of rent, performance of conditions, observance of contracts and indemnity.

For the section (27) treating of waste by a mortgagor in possession, Mr. West would substitute the following: "A mortgagor must not by any act or wilful omission destroy, or materially impair the value of, the mortgaged property or his interest therein as a security for the mortgage-money."

We recommend the omission of the section (28) requiring certain notices to be given by mortgagors making, or proposing to make, second and other subsequent mortgages. This provision (which was inserted by the Select Committee to which the Bill was referred) is a novelty, and does not seem to us likely to be of any practical use.

Section 34, expressing the present rule in the case of a mortgage by conditional sale, treats the mortgagee as having no remedy against the mortgagor personally, except in certain specified cases. Mr. West would substitute the following: "A mortgagee may sue a mortgagor for mortgage-money which has become payable in all cases except those wherein a personal liability has been excluded by express contact or by the nature of the mortgage."

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient, the mortgagee should, we think, be entitled to require the mortgagor to give him within a reasonable time another sufficient security for his debt, and if the mortgagor fails to do so, to sue him for the mortgage-money.

We think that a mortgagee interested in part only of the mortgage-money should not be precluded from suing for a partial foreclosure where the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

We would modify section 35 so as to allow powers of sale in all cases where the principal-money originally secured is five hundred rupees or upwards. They save litigation and expense. Their validity has been recognised in many parts of India. Moreover, interference with freedom of contract is *primâ facie* undesirable, and it is, in our opinion, only in small transactions, where the mortgagor is generally poor and ignorant, that any real danger exists as to the misuse of such powers. In some cases the mortgagor obtains money on easier terms by conferring a power of sale on the mortgagee, and the power is usually and not unreasonably inserted in mortgages to agents of indigo, coffee, and similar estates, where the value of the security might be considerably impaired

were the property neglected while the mortgagee was seeking a sale by order of Court.

Where the receipts from the mortgaged property are to be taken in lieu of interest, or of interest and defined portions of the principal, we do not think that a mortgagee in possession should be bound to collect the rents and profits and to repair.

The section (45) relating to mortgages made to secure the balance of a running account and expressing the maximum secured should, we think, be extended to mortgages to secure future advances and the performance of engagements.

We think that the Court should not postpone the day appointed for payment in a foreclosure-suit unless sufficient security is given as well as good cause shown, and we would modify section 50 so as to enable it to require such security.

The power conferred on a Court to order, in a foreclosure-suit, a sale in lieu of foreclosure, at the instance of the mortgagee, or at the instance of the mortgagor furnishing security for any balance which may remain unsatisfied by the proceeds of the sale, will be novel throughout the greater part of the Mufassal.* But it seems to us expedient for the mortgagor that the Court should possess this power, and that where the sale takes place at the instance of the mortgagee, he should not be allowed to recover any balance which he could not have recovered in the event of foreclosure, and that where the sale takes place at the instance of the mortgagor, the mortgagee obtains all that he is entitled to, if he receives his principal-money and interest.

Where a decree has been made for redemption, if the amount due is not paid on the day fixed by the Court, the plaintiff, where the mortgage is simple or usufructuary, should not be foreclosed, nor, where the mortgage is by conditional sale, should the property be sold.

Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, we think that he should be declared entitled to a charge on the share of each of the other co-mortgagors in the property, for his proportion of the costs properly incurred in so redeeming and obtaining possession. A decision of the late Sadr Court, North-Western Provinces, is to this effect. The High Court of Bombay also has ruled that the purchaser of the interest of one of several co-sharers in an equity of redemption may redeem the whole property and hold it subject to the rights on contribution of the other co-sharers.

The Bill should, Mr. Stokes and Sir Charles Turner think, provide separately for the rights and liabilities which arise where two or more forms of mortgage are combined.

Mr. Stokes would insert the following :—

"97. Where a simple mortgagee is, under the contract of mortgage, entitled as lessee or otherwise to receive the rents and profits accruing from the mortgaged property, such rents and profits shall, in the absence of a contract to the contrary, be credited to the mortgagor against the interest of the principal-money, and if they exceed the amount due in respect of interest, against the principal-money also. In other respects the rights and liabilities of the parties are the same as if the mortgage were purely simple.

Simple mortgage usufructuary.

Where a mortgagee by conditional sale is, under the contract of mortgage, entitled as lessee or otherwise to receive the rents and profits accruing from the mortgaged property, the rights and liabilities of the parties are, up to the date on which the principal-money has become payable, the same as if the mortgage were purely usufructuary, and from and after that date the same as if the mortgage were purely by conditional sale."

Conditional mortgage usufructuary.

Sir Charles Turner thinks that it would be enough to insert a simple declaration that the mortgagee and mortgagor have respectively the same rights and liabilities as are declared to be created in each of the several forms so combined, so far as such rights and liabilities are consistent with the mortgagee's availing himself of any of his remedies. Mr. West thinks that the general provisions of the Bill sufficiently cover this matter.

* But see, as to the Presidency of Bombay, Bombay Regulation V of 1827, *ad finem*.

There is a common practice on the part of mortgagees of suing their mortgagors on the debt as such, and in execution selling the mortgagor's interest in the property. This is purchased by strangers to the mortgage, who are thus virtually defrauded by an enforcement of the security, of the existence of which they were wholly ignorant. In order to check this practice, we have framed a section providing that, where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches and brings to sale the mortgaged property, or the mortgagor's interest therein, his security shall be extinguished unless before the issue of the proclamation under the Civil Procedure Code, section 287, he gives notice thereof to the Court executing the decree.

We concur with the late Law Commissioners in thinking that mortgage by deposit of title-deeds should not be recognized. It is now hardly known in the Mufassal. It is opposed to the policy of our registration-law: it leads to evasions of the stamp-duty; and it is at variance with the principle of making the system of transfer of immoveable property as far as possible a system of public transfer. When the amount secured is Rs. 100 or upwards, it would also be inconsistent with our proposed rule requiring a written instrument.

The section (64) relating to the merger of charges is, in the opinion of Mr. Stokes and Sir C. Turner, in exact accordance with the English and Indian decisions on the subject. Mr. West would substitute the following: "The holder of one of two or more incumbrances may purchase another, or the property subject thereto, and hold the same with his original incumbrance as separate interests."

For section 54 (as to the right to recover a balance due on a mortgage) Sir Charles Turner would substitute the following:—

"Where the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, together with the costs, if any, awarded to the mortgagee by the decree or in execution thereof, he may recover such balance and costs—

if the sale has been made in a suit for foreclosure, under the last paragraph of section 87, in execution of the decree, by enforcing the security; and if such security is a bond, with sureties, both against such sureties and the principal:

in any case, if under the contract the mortgagee was entitled to any other remedy for the recovery of the mortgage-debt in addition to a sale of the property sold, and such other remedy has been claimed and decreed in execution of the decree; but

if such other remedy has not been claimed and decreed, then by subsequent suit, unless he has by release or abandonment or otherwise lost such other remedy, or the suit is barred by limitation."

Lastly, we all think that the Bill should contain provisions as to serving notices, and making or accepting tenders and deposits, under this chapter, when the person concerned is non-resident, or unknown, or incompetent to contract. These provisions (which will be found in the revised Bill, ss. 101, 102) are novel; but they are suggested by difficulties which have occurred in practice. Mr. West is of opinion that the following principles should be explicitly set forth: (1) a transaction in any guise, the real intent of which is to make property a security for a continuing debt, is to be deemed a mortgage; (2) an unreasonable restriction on redemption is void; (3) time specified is not of the essence of the transaction for either party. Mr Stokes and Sir Charles Turner consider that it may be left to the Courts to determine in each instance what is the nature of a transaction, and whether time is of its essence, and that it would be inexpedient to do more, in respect of restrictions on redemption, than to give effect to the intention of the parties when it can be collected from the contract.

Chapter V: Of Leases of Immoveable Property.—A high authority objects to this chapter in that it deals "with matters which do not transfer property, but only create a limited interest in it." This is not, we venture to think, in accordance with either English or Indian law. The lessor not only creates, but conveys, an interest in the property concerned. We conceive, and have defined, a lease to be a transfer of a right to enjoy specified immoveable property, made in consideration of a premium or a rent. Such a right is "property," and the present chapter, therefore, in our opinion, rightly falls within the scope of a Bill entitled "The Transfer of Property Act."

We would require all leases from year to year, or for any term exceeding one year, or reserving a yearly rent, to be made by registered assurance. This agrees with the rule in the Registration Act (III of 1877), section 17, save that it omits the power given by that Act to the Local Government to exempt leases for terms not exceeding five years and for annual rents not exceeding fifty rupees. It is hardly necessary to point out that it also carries out the policy above referred to, of rendering the system of transferring immoveable property as far as possible a system of public transfer.

As to the respective rights and liabilities of the lessor and lessee, we would expressly recognize the right to distrain, subject to the local law relating to distresses. We think that the lessor's implied contract for quiet enjoyment should not in India be limited to the acts of the lessor or his transferees, or any person claiming through him or them. Where any material part of the property leased is by *vis major* destroyed or rendered substantially and permanently unfit for the purpose for which it was let, we recommend that the lessee should have the option of treating the lease as void. The lessee should, we think, in the absence of a contract or local usage to the contrary, be bound to make good only such defects as have been caused by his own act or default.

As to the effect of a surrender on an under-lease, we think that when the under-lease has been granted on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease, the under-lease should not be prejudiced. Mr. West thinks that the original lessor ought to be guarded against loss through sub-leases at reduced rents, and that sub-lessees willing to make good the terms of the original lease should be guarded against loss by any wilful forfeiture.

Mr. West would extend the section (73) relating to relief against forfeiture for non-payment of rent to all cases free from fraud and wilful neglect and reparable by damages.

Local legislation as to the relations of zamíndár and raiyat being so copious and elaborate, we think that the provisions of this chapter should not apply to leases for agricultural purposes, except in so far as the Local Government may declare all or any of such provisions to be so applicable, together with, or subject to, those of any local law for the time being in force.

Chapter VI: Of Exchanges.—This chapter will supply a distinct defect in the Contract Act. We would define "Exchange," not as an agreement, but as the fulfilment of an agreement by mutual transfer of dominion, and accordingly make the first section of this chapter run thus:—

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an 'exchange.'

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale."

The effect of this will be to render a registered assurance necessary in the case of an exchange of land worth one hundred rupees or upwards. Here again we have borne in mind the expediency of rendering the system of transfer of immoveable property as far as possible a system of public transfer.

We think the clause (section 77) relating to the right of a party evicted from a thing received in exchange should be made subject to a contract to the contrary.

In accordance with the suggestion of a distinguished Native lawyer, Srínivása Rao, we recommend the insertion here of a chapter on Gift *inter vivos*, saving of course the rules of Muhammadan law on this subject. We have framed some sections on this subject which will be found in chapter VII of the revised draft of the Transfer of Property Bill annexed to this Report. They define "gift": they show how a transfer must be effected for the purpose of making a gift (*a*) of immoveable property and (*b*) of moveable property: they require registration in the case of gifts of immoveable property of whatever value (Act III of 1877, section 17, clause *a*), and in the case of gifts of moveables, whenever the property given is not delivered: they provide a rule as to the effect of giving benefits to the persons attesting gifts of land: they declare that a gift comprising both existing and future property is void as to the latter, and that a gift of a divisible thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had

he accepted it. They show when a gift may be suspended or revoked. They exempt the donor from warranty. They deal, finally, with onerous and with univesral gifts. Gifts of one's whole property to a relation or friend are not uncommon before an execution or in anticipation of insolvency. For such cases of fraud section 53 of the revised Bill would provide when the property is land. But an universal gift may conceivably be honest and comprise moveable property. It should therefore, we think, be specially provided for.

Of these provisions it may be said, generally, that some have not hitherto been declared by the legislature or the Courts; but they proceed on principles already recognized. The rule declaring an universal donee liable personally for the donor's debts due at the time of the gift to the extent of the property given is not only obviously equitable but is, as we have said, required to meet a not uncommon fraud. It is also in conformity with Hindú law.

Chapter VII: Of transfers of Debts.—We think that this chapter should be entitled "Of Transfers of Actionable Claims," and that its provisions as to charges on debts and beneficial interests in moveable property should be omitted. We would provide rules as to the application and extent of the warranty of the solvency of a debtor. We think that in India it would be expedient to declare that, as a rule, when an actionable claim is sold, he against whom it is claimed is discharged by paying the buyer the price and incidental expenses of the sale with interest from the date of payment. Lastly, we think that no judge, pleader or other officer connected with Courts of justice should be capable of buying any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.

We have inserted in the repealing schedule the Statute of Uses (27 Hen. VIII, c. 10). It has no operation in the Mufassal; and in the Presidency-towns it will be inconsistent with the provisions of section 8 of the Bill as now revised.

We annex to this Report a copy (marked A) of the Bill as we have revised it.

3.—THE ALLUVION BILL.

This Bill, introduced into the Council of the Governor General on the 2nd October 1878, has been settled by a Select Committee, comprising amongst its members the Hon'ble Messrs. Evans, Thompson, Colvin, Cockerell, and Thornton.

We think that this Bill should save local customs, not only in the Panjáb, but in all other territories to which it is to apply. At the same time, seeing that customs, such as *dhárdhúra*, have in a measure survived the existence of the circumstances which made them reasonable, we are of opinion that the Bill should enable all persons whose interests as riparian owners are likely to be affected by custom in any particular place, by consent to abolish the custom and place themselves under the operation of the general law. This might be effected by a registered instrument.

We would omit the definition of "owner." The Courts may safely be trusted to determine who in a given case is the riparian owner.

We would omit the first of the three definitions of "thread of the stream."

In other respects we regret that we have been unable to come to an agreement regarding this Bill. Subject to the amendments just specified and those next hereinafter mentioned, Mr. Stokes approves of the Bill as settled by the Select Committee.

He thinks that each of the provisos to sections 4 and 7 should run thus:—

"Provided that, where the land or any portion thereof forms on a site which is proved to belong to a private owner, such owner is entitled to the land or portion so formed."

This expresses the rule in the case of *Lopez* v. *Muddun Thakur*, and reverts, substantially, to the wording of the Bill as introduced to the Legislative Council. To save the rights of Government as is done by the Bill as amended by the Committee would, as appears to him, render sections 4 and 7 altogether inoperative.

He agrees with the Bombay Government and Mr. Justice Mutusámi Ayyar, that islands formed in the sea should in all cases belong to the Crown.

He thinks that, where any question arises as to the division of lands under section 4 or section 6, an appeal should be given to the Civil Courts.

For the reasons given by Mr. Ibbetson in Paper No. 32, he would, in sections 7 and 9, substitute the word "bank" for the word "frontage," and for the second clause of the rule contained in section 7 he would substitute the following:—

"Where more than one such normal can be drawn from one and the same end of any bank, and each of such normals is of different length, the shortest of such normals shall be deemed to be the including line; and where more than one of such normals, being of equal length, can be so drawn, and there is no shorter normal, the line bisecting the angle between the extreme positions of the shortest normal shall be deemed to be the including line."

He agrees with the Panjáb Government in thinking that this rule might usefully be illustrated by diagrams.

Sir Charles Turner considers that the Bill as settled by the Select Committee is defective, and where it alters, does not always improve, the law obtaining in the Presidency of Fort William. He thinks rules for the guidance of the Courts should be framed in the simplest terms, and that instances of imperceptible accretion are so rare in a land of tropical rain that they may be left to be dealt with by the Courts on a general principle sufficiently understood. He agrees that all islands formed in the sea should be declared the property of Government, but believes they will be more speedily utilized if, when connected by a ford with a shore, they are given to the owner of the shore. He would reframe the bulk of the Bill as follows:—

"Shortest ford" and "nearest land" mean respectively the ford which is shortest, and the land which is nearest, when the water is at its average height, neither swollen by flood nor shrunk by drought.

Nature and extent of rights of owners in lands regained or acquired.

Where, under the provisions of this Act, land has been regained by reason of ownership of the site, or acquired by reason of ownership of land contiguous with or proximate to such acquired land, every person having an interest in land superior to that of a tenant from year to year without right of occupancy, or a tenant-at-will, has in the land so regained or acquired an interest the same as, or similar to, the interest he had in the site or such other land, as the case may be; but nothing in this Act shall be construed to enlarge the interest of any person having an interest limited in its nature or duration in derogation of the interests of a superior landlord or reversioner.

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Re-formation of land on a site of which the surface has been submerged or carried away.

4. Where land, owned by the Government otherwise than as part of the public waste or by a private owner, is submerged by the influx of the waters of a sea, lake or river, or where its surface is by the action of such waters carried away, and the land is rendered unfit for useful occupation, the ownership thereof continues and may be transferred by operation of law or act of parties, notwithstanding such submergence or destruction of surface; and, unless in the meantime it has been abandoned, may be asserted when, by the recession of the waters, alluvial deposit or otherwise, such land again becomes fit for useful occupation.

Land gained on a site forming part of the public waste.

5. Subject to the rule declared in section 4, where, on a site forming part of the public waste, land is by any of the causes mentioned in that section rendered fit for useful occupation in any sea, lake or river,—

(*a*) if it be gained as an island separated from the shores or banks by a channel or channels not fordable at any points, it is the property of the Government:

(*b*) if it be gained as an island and the channel or channels between it and the shore or bank are fordable at any point, it belongs—

in all parts of India except the Lower and North-Western Provinces of the Presidency of Fort William in Bengal, to the Government;

in the Provinces last mentioned, to the owner of the land from which access to the island can be obtained by the ford, or, where there are more fords than one, by the shortest ford, and, as between the owners of lands from which there are fords of equal length, to such owners in equal shares:

(*c*) if it be gained as an increment to the shore or bank, it belongs to the owner of the land to which it is adjacent.

Land gained on a site not forming part of the public waste.

6. Subject to the rule declared in section 4, where, on a site not forming part of the public waste, land is by any of the causes mentioned in that section rendered fit for cultivation in a sea, lake or river—

(*a*) if it be gained, whether as an island or as an increment to the shore or bank, and

within the ascertainable boundaries of any estate, it belongs to the owner of such estate:

(*b*) if it be gained as an island in a sea or lake and not within the ascertainable boundaries of any estate, it belongs to the owner of the land on the shore to which it is nearest; and if different parts of it are respectively nearer to the lands of different owners, each owner is entitled to so much of the island as is nearest to his land on the shore:

(*c*) if it be gained as an increment to the shore or bank of any sea or lake and is not within the ascertainable boundaries of any estate, it belongs to the owner of the land on the shore or bank to which it is adjacent:

(*d*) if it be gained as an island in the bed of, or an increment to the bank of, a river and within the estate of the owner of the bank on the one side or the other, such estates being conterminous, but the boundary between them is not otherwise ascertainable, the middle thread of the stream in the season immediately before the land was formed shall be deemed to have been the boundary, and the land lying between the line occupied by the thread of the stream and each bank shall belong to the owner of such bank.

7. If land is severed by inundation, the owner retains the ownership thereof, notwithstanding such severance.

Land severed by inundation.

Abandoned river-beds.

8. Subject to the rule declared in section 4, where a river suddenly abandons its bed, the land thereby gained—

(*a*) if it lies in the public waste, belongs to the Government;

(*b*) if it lies within the ascertained boundaries of an estate, to the owner of such estate;

(*c*) if it lies within the estate of the owner of the bank on the one side or the other, such estates being conterminous but the boundary is not otherwise ascertainable, the middle thread of the stream in the season preceding the abandonment of the bed shall be deemed to have been the boundary, and the land lying between the line occupied by the thread of the stream and each bank shall belong to the owner of that bank.

9. Where newly-gained land falling under the rules declared in sections 5 (*c*), 6 (*c*), 6 (*d*), or 8 is adjacent to or lies in front of the lands of different owners on the same shore or bank, each of such owners is, as between himself and the others, entitled to the newly-gained land lying adjacent to or in front of his own land, and the newly-gained land shall be divided among such owners on such principles as appear to the Court equitable and consistent with the principle of the rule declared in this Act respecting the ownership of land so gained.

Division of lands falling under sections 5 (*c*), 6 (*c*), 6 (*d*), and 8 between different owners on the same shore or bank.

10. Where land is regained or acquired by a private owner under the provisions of this Act and is not at the time assessed with revenue, it may be assessed as soon as it becomes fit for useful occupation; and if within three years after it has become fit for useful occupation the person liable to pay revenue for the same, or entitled to engage for the revenue payable in respect thereof, fails to inform the Collector of his readiness to pay the revenue (if any) payable in respect thereof, or to accept a settlement or engagement for such revenue, he shall be deemed to have abandoned his title to the land.

Revenue to be assessed on lands acquired under the Act.

Notice to be given to Collector when land becomes fit for useful occupation.

Persons liable to pay revenue or entitled to engage to be deemed to have abandoned their title to the land on failure to give notice.

11. Where land is regained by a sub-proprietor or tenant under the provisions of section 4, and proprietary dues or rent have not been payable by him for the site thereof while unfit for useful occupation, and he is not entitled to hold the land rent-free, he shall, in respect of the land so regained, and in proportion to its extent, pay to his immediate superior in title or landlord dues or rent—

Dues or rent payable by sub-proprietors or tenants for lands acquired by them under section 4.

(*a*) where the rates payable by such sub-proprietor or tenant have been fixed in perpetuity – at the rates so fixed;

(*b*) where the rates have not been so fixed, but prior to the date of becoming unfit for useful occupation such sub-proprietor or tenant was entitled to hold at favourable rates—at such rates;

(*c*) and in any other cases—at such rates as are paid by sub-proprietors or tenants (as the case may be) of a similar class for land of a similar character and subject to the same conditions in the neighbourhood.

12. Where land is acquired by a sub-proprietor or tenant under the provisions of section 5 or 6, and the site thereof is not included in his original holding, nor are proprietary dues or rent paid by him for such site, unless such holding be rent-free, he must pay to his immediate superior in title or landlord, in respect of such newly-acquired land and in proportion to its extent, dues or rent (as the case may be) at the rates payable in respect of his original holding.

Dues or rent payable by sub-proprietors or tenants for lands acquired under section 5 or 6.

13. If any sub-proprietor or tenant entitled to any land under the provisions of this Act shall for three years after the same has become fit for useful occupation fail to inform his immediate superior in title or landlord of his intention to take such land and of his readiness to pay for such land such dues or rent as may be payable under this Act in respect thereof, he shall be deemed to have surrendered his rights thereto. Such surrender shall not defeat the title of any inferior proprietor or tenant who has given notice under this section to the person to whom he is required to give the same.

Omission of sub-proprietor or tenant to notify intention to take land to which he is entitled under the Act.

14. All land and islands formed, and all river-beds abandoned, under the circumstances mentioned in this Act, and which are not by this Act declared to belong to private owners, are the property of the State, and any such land, island or abandoned river-bed which has not for three years after it has become fit for useful occupation been occupied by a person declared by this Act entitled thereto shall lapse to the Government.

Right of Government to land not hereinbefore provided for or unoccupied for a certain period.

15. The Local Government may for the purposes of this Act, from time to time, declare—

with reference to any river, at what season in the year, and with reference to any tidal river, at what time of the tide, the average height shall be ascertained; and

with reference to any tidal river, where, for the purposes of this Act, the river shall be deemed to end and the sea to begin.

Power to declare season at which average height of a river shall be ascertained and where river ends and sea begins.

Every declaration made under this Act shall be published in the official Gazette, and have thereupon the force of law; and no such declaration shall be altered or cancelled save with the previous sanction of the Governor General in Council.

In section 11 of the Bill he would substitute, in clause (*c*), the word "boundaries" for "area," and the word "have" for "has;" and he would add to clause (*b*) :—

"or, where such right has been, immediately before any alteration in the shore or bank, enjoyed, the free access of the public to the waters of a lake, sea or river, or the free passage of cart, horse or foot-traffic along the shores or banks; and such right shall subsist notwithstanding any alteration of the shore of a sea or lake, or the bank of a river, from the causes mentioned in this Act, and be exercised in such a manner as to secure to the public as far as possible the convenience theretofore enjoyed."

He would also add to clause (*g*)—

"where such power has been heretofore enjoyed."

Mr. West thinks the Bill should provide as follows:—

"The bed of the sea, of lakes below the ordinary dry-weather level of the water, of tidal rivers and of rivers capable of use for navigation or traffic belongs, in the absence of private interests acquired by grant or prescription, to the Government.

The bed of any other river or stream may be presumed to be the property of each riparian owner as to the space lying between his frontage and the mid-thread of the stream.

Explanations.—'Frontage' means the line described by the edge of the water at its medium height. 'Mid-thread' means the middle line between opposite frontages.

The up-stream and down-stream boundary of property in the bed is to be ascertained by drawing perpendiculars from the extremities of the frontage to the mid-thread.

Where two or more equal perpendiculars shorter than all others can be drawn, the boundary is the line bisecting the greatest angle contained by them.

Where the mid-thread is a curved line, the perpendicular lines are to be drawn to lines tangential to the curve where such perpendiculars strike the mid-thread.

The bed of a lake not being the property of Government may be presumed to belong to the riparian owners according to the following rules:—

(*a*) In the case of an inlet whose length landwards exceeds its breadth, the middle line between the opposite frontages is to serve as the mid-thread of a stream up to a point where the prolongation of such line to the shore equals the perpendiculars drawn to the line from the opposite frontages.

(*b*) Land intersected by any line drawn from such point perpendicular to the general line of the shore belongs to the owner of the frontage struck by it.

(*c*) Where the two rules would give different boundaries between contiguous properties, the latter is to prevail.

(*d*) In other cases the boundary-line between properties having contiguous frontages is the shortest line that can be drawn from the point at which they meet to the line described by the edge of the water at the ordinary dry-weather level, disregarding slight inequalities.

(*e*) If two or more such lines be equal, the boundary is the line bisecting the greatest angle contained between such equal lines.

(*f*) Where the conformation of the lake prevents the application of the foregoing methods, the boundary towards the lake of properties having contiguous frontages is a line drawn from the point where they meet so as to be continually perpendicular to the edge of the water as it recedes to the ordinary dry-weather level.

If land is severed or submerged by water, the ownership thereof and of its site, if capable

of identification, remains unchanged until expressly or impliedly abandoned, or the acquisition thereover of new rights inconsistent with such ownership.

Land formed by natural causes on any site belongs to each owner thereof for his interest therein.

Exception.—Land which can be identified as belonging to a property whence it has been carried away by avulsion and cast on another may at his option be taken away by the owner of the former property.

Imperceptible accretions to riparian land, and accretions to such land to which no superior claim is asserted, belong to each owner of such land for his interest therein.

Where a river is divided into channels by an island, an owner of property in such island having a frontage on a channel, is a riparian owner with reference to owners of contiguous properties and to owners of property on the opposite bank of the river, and, as between such owners, the dividing channel only is to be deemed the river or stream.

In the districts wherein Regulation XI of 1825 is in force, and in the districts wherein the interests, rights, and duties arising from formations or diminutions of land, from the submergence of land, or from its exposure by the recession of water, are governed by any customary or other local law, such Regulation and such law shall, as to all matters provided for by the same, continue in force notwithstanding anything in this Act contained.

The owner of any property abutting on, or extending into, the sea or a river or lake may apply to the Local Government to determine by survey and enquiry the proper boundary of his property, to set up proper land-marks, and to make correct plans for the said boundary with reference to known permanent objects. One of such plans shall, when the survey has been made by the person appointed by Government, be deposited in the office of the Collector, and one shall be registered by such owner, with a declaration that his ownership extends to the boundary thereby defined. After the lapse of one year without a suit to contest their correctness, such plan and declaration shall be conclusive evidence of the boundary.

Should any person deem himself injured or likely to be injured by such proceedings he may, within one year from the registration aforesaid, bring a suit for the rectification of the boundary, which shall in such case be determined according to the result of such suit; and new plans, in case of variance, shall be deposited by the person interested in the office of the Collector, and shall be registered by such person.

Such plan shall be conclusive of the boundary as between the parties to the suit. As to other persons, it shall be conclusive, unless within one year from its registration a suit is brought for a rectification of the boundary as therein defined. To any such suit the preceding section shall apply.

The expenses of the surveys hereinbefore contemplated must be defrayed by the person calling for or requiring the same, according to such rules as the Local Government may prescribe.

The Local Government, after giving public notice, may of its own accord and at the public expense make a survey of any such boundary as aforesaid; and the plans and declaration corresponding to the result may be deposited and registered by the Collector or other officer authorized on that behalf, with the like consequences and subject to the same proceedings as in the case of a private person.

The Local Government may make rules for giving effect to this Act, which, when published in the Government Gazette, shall have the force of law.

The Local Government may appoint officers either generally or specially for carrying out the provisions of this Act.

No owner of land submerged by a (lake or) river capable of use for navigation or traffic shall be at liberty, while such land is covered with water so as to be included in the bed of the stream, to occupy or make use thereof in any way which may prevent or impede the use of such river for navigation, traffic or other usual purposes. All legal regulations as to navigation, the use of the water, and of the bed of the stream, applying to a river generally, shall apply equally to those places where it flows over land which is private as to those where it flows over public property.

A custom inconsistent with this Act shall be abrogated by disuse for twelve years, or, as to any village or town, at the request of a majority of the riparian owners with the assent of the Local Government.

Section 11, clause (*a*) of Bill, extended so as, when a riparian owner is entitled to alluvion in virtue of his estate, to give it to him according to (or for) his interest in such estate."

4.—THE MASTER AND SERVANT BILL.

We think that this Bill not only fills up a distinct gap in the system of Indian jurisprudence, but will tend in practice to prevent misunderstandings and consequent ill-feeling and litigation between master and servant; and its rules as to notice will preclude much uncertainty on the part of the Courts. We are of opinion, with Savigny (*System d. h. R. Rechts*, s. 55) and other jurists, that the law of hired service should be dealt with as part of the law of persons rather than as a branch of the general law of contract. The relation of

master and servant, though, like marriage, it arises from contract, yet when once constituted involves rights and duties of a kind essentially different from those arising on a sale of timber or wool. They are but partially amenable to strict regulation, and the peculiar relation of the parties specializes and limits, while it justifies, a particular sanction and jurisdiction for enforcing the reciprocal duties that arise from it. We, therefore, all approve of the inclusion of the Acts empowering Magistrates to deal punitively with artisans who have received advances and with workmen employed on public works. We recommend the omission of the sections in their present form giving Magistrates jurisdiction in disputes between masters and domestic servants. They are not, in our opinion, open to the objections taken by an eminent critic; but they might, we think, have occasionally caused hardship. Sir Charles Turner would put nothing in the place of these sections. His reasons are fully stated in a note appended to this Report. But breaches of contract seem proper subjects for penal legislation when committed by persons from whom it is impossible to recover damages. For this and the other reasons given in the Statement of Objects and Reasons, Mr. Stokes and Mr. West are of opinion that selected Magistrates ought to have a summary power to enforce the servant's principal duties. The complaints should be made promptly and by the head of the household. The punitive jurisdiction should be exercised only in extreme cases, and means should be secured for an effective review. On the other hand, a domestic servant should have a simple, cheap, and speedy remedy against a master who wrongfully discharges him or withholds his wages. To attain these ends, they propose the following sections :—

"22. If a domestic servant commits any of the following offences—

Complaint by master.

(*a*) wilfully and wrongfully fails to enter into his master's service,

(*b*) wilfully and wrongfully absents himself therefrom,

(*c*) wilfully disobeys any order which as a domestic servant he is bound to obey,

(*d*) does anything with the intention of causing wrongful gain or wrongful loss to his master,

(*e*) wilfully damages his master's property,

(*f*) intentionally insults, and thereby gives provocation to, any person to whom he is bound, as a domestic servant, to be respectful, intending, or knowing it to be likely, that such provocation will cause such person to break the public peace or to commit any other offence,

his master, or the person having control of his master's household, may, within fifteen days of the date on which such offence is committed, make a complaint of such offence to a Magistrate having jurisdiction in the case.*

Explanation.—Nothing is an offence under this section where the harm thereby caused, or intended to be caused, or known to be likely to be caused, is so slight that no person of ordinary sense or temper would complain of such harm.

"23. The Magistrate shall examine the complainant on oath, and if after such examination there is, in the Magistrate's opinion, no sufficient ground for proceeding, he may dismiss the complaint. But if, in the Magistrate's opinion, there is sufficient ground for believing that the servant has committed any offence mentioned in section 22, he shall issue his summons, or, if for reasons to be recorded by him it appears necessary, his warrant, for causing the servant to appear or to be brought at a certain time and place before him.

If the Magistrate convicts the servant of any offence triable under this section, he may by a certificate signed by him with his name of office, discharge the servant from the service of his master, and the master from all or any obligations to the servant. But if, in the opinion of the Magistrate, such discharge will not be a proper or adequate punishment, he may, after recording the facts proved and the grounds of his judgment, sentence the servant to imprisonment in the civil jail for a term which may extend to one month, or to fine which may extend to fifty rupees, or to both.

When the servant is a male under sixteen years of age, the Magistrate may sentence him to whipping in lieu of the fine or imprisonment aforesaid.

"24. If a master wrongfully discharges a domestic servant or fails to pay his wages for a period of more than fifteen days from the time when they become payable, the servant

Complaint by servant.

may, within three months of the date of such discharge or the expiration of such period, make complaint of the facts to a Magistrate having jurisdiction in the case.

The Magistrate shall examine the complainant on oath, and if after such examination there is, in the Magistrate's opinion, no sufficient ground for proceeding, he shall dismiss the complaint. But if, in the Magistrate's opinion, there is sufficient ground for believing that the master has been guilty of the act or omission complained of, he shall issue his summons for causing the master to appear at a certain time and place before him.

*He will be, in the Presidency-towns, a Presidency Magistrate, and elsewhere a Magistrate of the first or second class specially empowered by the Local Government.

If the complaint is proved, the Magistrate shall order the master to pay to the servant such sum not exceeding one hundred rupees as the Magistrate thinks reasonable compensation for such discharge or failure, together with the wages, if any, due to the servant, and, in case of non-payment of the amount so ordered to be paid, may levy the same as if it were a fine.

"25. In the trial of cases under section 23 or section 24, the Magistrate shall be guided, in the towns of Calcutta, Madras and Bombay, by the rules contained in the Presidency Magistrates' Act, 1877, sections 114 and 237, and elsewhere by the rules regulating the trial of summons-cases. He may make such order as he thinks fit in regard to the costs of the summons or warrant.

Procedure.

"26. If any complaint under section 22 or section 24 is, in the opinion of the Magistrate, frivolous or vexatious, the provisions of the Code of Criminal Procedure, section 209, or (in the said towns) of the Presidency Magistrates' Act, 1877, section 242, shall, *mutatis mutandis*, apply."

Frivolous or vexatious complaints.

We agree with the Chief Commissioner of British Burma that the Bill should extend to the whole of British India. Where, as in Burma, most of the domestic servants come from Madras or Bengal, a law with which they were unfamiliar might be held sometimes *in terrorem* over their heads in order to make them submit to unjust treatment, and false and exaggerated reports gaining currency might seriously interfere with the supply of such servants. Provisions corresponding with Acts XIII of 1859 and IX of 1860, which confer magisterial jurisdiction over artizans and others who have received advances, and over workmen employed on public works, may now, we think, be made generally applicable. Both Acts have worked beneficially in large portions of the country. They have been tested by twenty years' experience; and, while the High Courts do their duty, they cannot be made a means of oppression. But we think that the section corresponding with Act XIII of 1859 should not extend to cases where the advance has been worked out or duly expended.

We are of opinion that the following minor changes should be made in the Bill.

We think that the clause (section 11) relating to the servant's obligation to be obedient should run thus: "He must obey all reasonable orders relating to his employment given by his master or by any person to whom the master has expressly or impliedly delegated power to give such orders."

We would omit the clause (section 11, clause *l*) imposing on a domestic servant the duty, on being so required, to accompany his master to any place not more than one hundred miles from the place where he entered the service. Considering the very various classes of persons included under the expression "domestic servant," it would be impossible to frame a rule on the subject which would not often give rise to hardship; and we think the matter may properly be left to arrangement in each case.

Where a servant is disabled by illness from performing his duty, he should provide at his own expense a substitute satisfactory to his master; but this rule should not in our opinion apply where the illness arises from injury received in the course of his employment.

We would not allow a master in every case to discharge without notice a servant for habitual idleness, for being declared an insolvent, or for theft, rape or adultery while in the master's service; but we think he should have that power in the case of a single instance of the servant's intoxication or insolence, or gross negligence in the performance of his duties, and also where the master discovers that the servant has been guilty of misconduct, before or after the commencement of his service, implying a defect in character which unfits him for such service.

We would omit the two sections (14, 15) dealing respectively with the master's right to sue third persons for compensation for loss of service and the effect of a servant's contributory negligence. They will find their proper place in the Code of Torts or Actionable Wrongs, which we think should be undertaken without delay. We would retain the section dealing with the servant's right to compensation for breach of the master's duties.

We would confine the master's obligation (section 17, clause *j*) to provide fellow-servants of ordinary care and reasonable skill to cases where the service is a work of danger.

Mr. West is of opinion that the power of moderate chastisement may properly be delegated to the masters of minor servants by their parents or guard-

ians. It will, he thinks, save boys from sudden dismissal and loss of character at an age when remote consequences cannot be appreciated by them; it is the only kind of discipline to which young and rude natures are amenable: under section 29 of the revised Bill an apprentice is subject to chastisement; and the omission of the power, so guarded as it is, may do an injury to many Native boys by preventing masters who know what boys are from employing them. It is a discipline to which virtually every English boy in a like situation and under the like circumstances is subjected—and on the whole for his good. The instances in which boys suffer any ill-usage at the hands of their employers are so rare that they may be almost excluded from consideration in framing a general rule. Mr. Stokes and Sir Charles Turner, on the other hand, consider that in this country it would be inexpedient for the legislature to sanction the employment of violence by a master on any servant.

Mr. West would expressly forbid the servant to receive, without his master's consent, any premium or commission from any other person on account of any business or transaction in which he has dealt with such persons as his master's agent. The prevalence of the dishonest practice at which this rule is pointed is, in his opinion, a reason for its introduction, not for its omission.

Mr. West would extend the section (27) empowering Magistrates to deal summarily with disputes between employers and their workmen employed on public works to cases where those works are on account of a municipality. In such cases, owing to the large number of persons employed, the settlement of disputes by the ordinary civil process might, in his opinion, well occupy the whole time of the employer and bring the works to a standstill. At the same time such disputes as arise are, legally, of the simplest character. Mr. Stokes and Sir Charles Turner do not consider the proposed extension desirable. We all think that the amount awarded under this section should (as is the case under Act IX of 1860) be recoverable only by distress and sale of the defaulter's moveable property.

We doubt whether the presumption in section 6, clause (*d*), that artizans and workmen are hired for no specific term, is justifiable in some parts of India, and we suggest that special inquiry on this point be made of the Local Governments. We would also suggest for consideration that the Bill should contain a rule that an artizan or workman breaking off in the middle of a day should forfeit that day's wages unless hired by the hour, and that, conversely, a master dismissing an artizan or workman in the middle of the day should pay him that day's wages.

We have considered the question raised by the first draft of the Bill, as to whether a compulsory system of registering domestic servants should be introduced by imperial legislation. We are, on the whole, opposed to such introduction. It may be that in some places registration is desirable, if not absolutely necessary; but where the expediency of legislation in this direction is recognised, the end should, in our opinion, be sought by municipal regulations under local laws.

Lastly, we would repeal and re-enact, as part of the Bill, the substance of Act XIX of 1850 (*for the binding of Apprentices*). We make this recommendation partly because the subject is intimately connected with the law of master and servant, partly because we think it desirable that the provisions of the Apprentice Act should now be revised with reference to the changes produced by recent legislation and by the establishment in India within the last thirty years of railway-workshops, factories, and steam-packet companies. We would, for example, suggest that the provisions of that Act, as to depositing contracts of apprenticeship in Magistrate's Court or the offices of persons appointed under Act X of 1841 to register ships, might now be modified so as to require deposit in the ordinary registration-offices.

We annex to this Report a copy (marked B) of the Bill as we have revised it.

5.—EASEMENTS BILL.

We concur in the opinions expressed by Sir Michael Westropp, Mr. Justice Jackson, and Mr. Justice Innes that it is desirable to codify the law

on this subject, which is now (to quote the Chief Justice of Bombay) "for the most part to be found only in treatises and reports practically inaccessible to a large proportion of the legal profession in the Mufassal and to the subordinate judges. We also agree with Mr. Justice Elsmie, that the frequent litigation in the case of urban easements is largely due to the fact that neither the people themselves nor the majority of the Courts understand the principles upon which such disputes should be determined.

The chief objections taken to the Bill are that, by informing people of their rights, it will provoke litigation, and that it will abolish or otherwise interfere with easements recognized only by local usage. The former objection, if valid, is an objection to all positive law declaring rights, and, in a less degree, to every decision of a Court of justice which enunciates a general rule respecting rights. But it is matter of ordinary experience that people are more prone to bring or resist claims to doubtful than to certain rights; that, in other words, litigation is promoted by doubt as to what is, and what is not, a right recognised by the Courts of justice. By its explicit declarations of the law on points now held doubtful by the people, the Bar and the Judges of the Subordinate Courts, the Bill appears to us calculated to check, rather than increase, litigation. As to the latter objection, that the Bill will interfere with local usage, we have been unable to find in the papers submitted to us a single instance of a right in the nature of an easement that would have been affected *in malam partem* by the Bill; and we strongly suspect that many of its critics have confounded rights in gross with easements properly so-called. Easements, being restrictions on the free use of property in others, are regarded with disfavour by the law; and section 7 of the Bill was accordingly framed so as to state the fact that all easements are in derogation of certain natural rights and to prevent attempts to create new kinds of easements. It enumerated the rights of one or other of which every easement must be a restriction, and thus intentionally excluded every kind of servitude not now known to the law. This, however, has been objected to on the ground that there may be in some parts of India rights not so enumerated. We admit the possibility, though not the probability, of the existence of such rights; and we recommend that section 7 should be modified as follows:—

"Easements are restrictions of one or other of the following rights (namely):—

(*a*) the exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same, and all products thereof and accessions thereto, as he thinks fit;

(*b*) the right of every owner of immoveable property (subject to any law for the time being in force) to enjoy, without disturbance by another, the natural advantages arising from its situation.

Illustrations.

(*a*) The exclusive right of every owner of land in a town to build thereon, subject to any municipal law for the time being in force.

(*b*) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(*c*) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(*d*) The right of every owner of land to so much light and air as pass vertically thereto.

(*e*) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure, and the 'subjacent and adjacent soil' mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(*f*) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through, his land, shall not, before so passing or percolating, be unreasonably polluted by other persons.

(*g*) The right of every owner of land to collect, and dispose within his own limits of, all water under the land and all water on its surface which does not pass in a defined channel.

(*h*) The right of every owner of land that the water of every natural stream which passes by, through or over, his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond, into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

(*i*) The right of every owner of upper land, that water naturally rising in or falling on such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

(*j*) The right of every owner of land abutting on a natural stream, lake or pond, to use and consume its water for drinking, household-purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners."

Should, for instance, a 'natural right' to lateral access of light or air, or to the non-diminution of the supply of fish, be hereafter established in any part of India, the section as now modified will not exclude an easement in derogation of such right. We are aware that section 7, even in its new form, may operate indirectly as a statutory recognition of various rights connected with the ownership of land. But a definite conception of these is a necessary preliminary to the codification of the law of actionable wrongs, and we see no substantial objection to inserting it for the present in a Bill dealing with restrictions of the rights in question.

We would also insert the following section:—

* "19. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

"*Illustrations.*

"(*a*) By the custom of a certain village, every cultivator of village-land is entitled, as such, to graze his cattle on the common pasture. A, having bought a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

"(*b*) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house."

And to the first section of the chapter containing the rules as to the incidents of easements, we would add the following sentence: "And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall be deemed to affect such incident."

The other amendments which we would recommend are comparatively unimportant.

We would modify the clause (section 2) saving Government-rights to regulate distribution of water, so as to avoid stating positively that the Government has such rights in the case of all rivers and streams flowing in natural channels. It is true that the preamble to the Northern India Canal and Drainage Act, 1873, contains a statement to that effect;* but the correctness of that statement is open to doubt, and in any case it applies only to the North-Western Provinces, the Panjáb, Oudh and the Central Provinces. We would extend the clause so as to save any right of Government to regulate the collection and retention of the water of such rivers and streams, and the collection, retention and distribution of water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation.

We would expressly save rights in gross possessed by the Government or public, and rights acquired or arising out of relations created before the proposed Act comes into force.

We would add to section 6 an illustration showing that an easement to restrain interference with privacy is recognised by the Bill, and is a negative easement. Such an easement, founded as it is on the oriental custom of secluding females, is of much importance in India; it is recognised generally in the countries whose system is founded on the Civil Law; and the decisions of the High Courts adverse to such a right should not, we think, be followed by the legislature.

* This preamble is identical with the preamble to Act XXX of 1871. Sir James Stephen says that he always understood that this "was one of the parts of that Act which was most strongly objected to and one of the principal causes of its being disallowed by the Secretary of State." As a matter of fact, the preamble was not objected to, and the reason of the disallowance was that the Act contained six sections (44 to 49), providing for the levy of a special water-rate on lands irrigable but not irrigated.

We think it would be well to add to the section (10) dealing with the power of lessors and mortgagors to impose easements a clause declaring that no lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest or in derogation of the rights of the lessor or the superior proprietor.

For the provisions of the Bill (section 11) relating to the acquisition of easements by lessees, we would substitute the following: "No lessee of immoveable property can acquire, for the beneficial enjoyment of other immoveable property of his own, an easement in or over the property comprised in his lease."

We think that easements of necessity, strictly so-called, should be separated in section 12 from those apparent and continuous easements which arise when a transfer is made, which are necessary for enjoying the thing transferred, or other immoveable property of the transferor, as it was enjoyed when the transfer took effect.

When the person entitled to set out a way of necessity refuses or neglects to do so, we think the dominant owner should be entitled to set it out. The second paragraph of section 13 declares that a way of necessity cannot be varied save with the consent of both dominant and servient owners, or unless the servient owner renders it impassable. We have struck out this paragraph, as Mr. West thinks it opposed to Indian rural economy and convenience, on account of periodical fallows of parts of the same land, of crops sown and growing at different times, and of the great temporary changes arising from the extremes of wet and dry weather making a strict adherence to the same road in all seasons in many instances almost impossible.

In the section (15) relating to the acquisition of easements by prescription (which, with the exception of the clause relating to easements of support, has been the law of the land since 1871),* we would restore the words "and as of right" to the clause dealing with the access and use of light and air. Under the English Prescription Act a claim to an easement is defeasible if the easement can be shown to have been enjoyed by express agreement in writing, and we think that the following explanation should be inserted in the Indian law:—

"Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease."

With reference to the decision in *Angus* v. *Dalton*, L. R. 3 Q. B. 85, we think that the following explanation might usefully be inserted:—

"In the case of an easement of support, where the soil of the dominant heritage is subjected to an artificial pressure not externally apparent, or where the outward thrust of things affixed thereto is enhanced by causes not externally apparent, the said period of twenty years begins when the circumstance by which the burden on the servient heritage is increased becomes known to the servient owner."

We have struck out section 18, which declares that no right to an easement can be acquired by long and continued possession, except under section 15. It was intended to abolish prescription at common law, which has been held to exist in the Presidency-towns. But it appears to be unnecessary, and might possibly mislead in the case of rural easements special to India or to particular districts, and not included amongst those enumerated in section 15, or not readily yielding to the conditions imposed by that section.

We think that the provision (section 29) as to the extent of an easement where the dominant heritage is increased by alluvion or diminished by diluvion should run thus:

"Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased; and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished."

It appears to us that the section (45) relating to the extinction of an easement by alteration of the dominant heritage should be thus worded:

"An easement is extinguished—

(*a*) where the dominant heritage is substantially changed and it is not proved that the easement was intended to continue annexed thereto notwithstanding such change; or

* See Act No. IX of 1871, section 27 = 2 & 3 Will. IV, c. 71, secs. 2, 3.

(*b*) where by any change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced to its original limits, and it is not proved that the burden was intended by the parties to be subject to increase by such change."

As to the extinguishment of easements by non-user (section 59), we think that a distinction may properly be drawn in this respect between continuous and discontinuous easements, and that in the case of a discontinuous easement the dominant owner should be enabled to keep it alive by registering a declaration of his intention to retain it.

Though fully recognizing the propriety of the rule (section 52) that the servient owner has no right to require that an easement should be continued, we think, nevertheless, that the dominant owner ought not to be allowed to damage the servient heritage by suddenly and maliciously abandoning or suspending the easement. We recommend, then, that the rule should be, that the servient owner is not entitled to compensation for damage caused by the abandonment or suspension, if the dominant owner has given him such notice as will enable him, without unreasonable expense, to protect the servient heritage.

We think that the Bill may properly be supplemented by a chapter on Licenses, which, though mentioned in the Evidence Act, sections 116, 117, are nowhere dealt with in the body of Indian codified law; and we have framed rules on this subject which we think will be useful.

We annex to this report a copy (marked C) of the Bill as we have revised it, Mr. West, however, desiring it to be understood that the details of the measure should, in his opinion, be open to revision according to the further information which may become available to the Legislature by the time the Bill is before it.

6.—THE PRIVATE TRUSTS BILL.

It seems to us that this Bill, especially the chapter dealing with constructive and resulting trusts, will supply a real defect in the codified law of India and be of practical utility to the Mufassal Courts and pleaders. We have duly considered the remarks of Sir James Stephen on the ambiguity of the word "trust" as understood by English lawyers. But we are unable to agree that they constitute an argument of any weight against the Bill, or that its enactment will introduce the serious evils that he anticipates. Cases frequently arise in which in one sense there has been a trust, though not in the sense to which the Bill confines it. Pleaders having got hold of the word "trust," then build upon it arguments drawn from the English books which may well milsead Judges who are not more than usually circumspect. This must go on until legislation regulates this branch of the law. By saying what is a "trust", and which of the relations arising from it amongst those recognized by the English Courts are to be admitted and which not, the Legislature will obviate the very evil which Sir James Stephen fears. The Courts are introducing, and from the necessities of the case must introduce, the English Law of Trusts indiscriminately, unless the law distinctly says how far they may go. Trusts created by an old man for his own maintenance and ulterior purposes, for a widow, for a daughter, stepdaughter or daughter-in-law and her children, are of pretty frequent occurrence among the Natives of India; and it is desirable to keep them free from the complication of double estates, in which, without the intervention of the Legislature, they are certain to become entangled. We need hardly say that the system of *benámi*, or the enjoyment of the profits of property held by another in trust for the beneficiary, was familiar to the people of India before the introduction of British rule, and in no country, owing to the extreme subdivision of immoveable property and the partition of inheritances, are constructive trusts more common. Gains made by one person at the cost of another are an every-day source of litigation: these cases must be dealt with in some way; and here, too, definite legislation will clear and simplify the law. But, apart from the Native property-holder, there is the large body of domiciled Europeans and Eurasians who have for nearly a century enjoyed and

taken advantage of a trust-law recognized by our Courts; and, now that the number and wealth of this class have increased, and every Court in the country may be called upon to administer a trust-law, the question of the advisability of its codification seems no longer open to discussion.

Chapter I: Preliminary.—We would expressly exclude from the operation of the Act private religious or charitable endowments (which may fitly be left to family or local usage); and we would declare that nothing in its second chapter (*Of the creation of Trusts*) shall apply to trusts created before it comes into force.

To avoid the conceivable risk of confounding trusts with bailments, we recommend that the definition of "trust," which was taken from the New York Civil Code, should be modified as follows: "A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner." And in order to prevent the possible introduction by pedantic lawyers of conceptions resembling the English legal estate and equitable ownership, we would define the "beneficial interest" of the beneficiary as his "right against the trustee as owner of the trust-property." The beneficiary should, in our opinion, have no estate or interest in the subject-matter of the trust.

We think that the definitions of "passive trust," "active trust," "executed trust" and "executory trust" are unnecessary and should be omitted.

We would extend the definition of "notice" so as to cover cases where information is given to, or obtained by, an agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229.

Chapter II: Of the Creation of Trusts.—We would provide expressly in section 4 that, where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

We agree with the framer of the Bill as to the expediency of excluding oral declarations of trust in every case where land forms the subject-matter: but we think that the requisite written declaration may be signed by the trustee as well as by the author of the trust; and we are of opinion that, unless the trust is declared by will, or the author is himself the trustee, the property should be actually transferred. We would, therefore, make the sections relating to the declaration and creation of trusts run as follows:—

"5. No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or the trustee.

No trust in relation to moveable property is valid unless so declared, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

6. Subject to the provisions of section 5, a trust is created when the author of the trust indicates with reasonable certainty, by any words or acts, (*a*) an intention on his part to create thereby a trust, (*b*) the purpose of the trust, (*c*) the beneficiary, and (*d*) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee."

We would declare that the subject-matter of every trust must be property transferable to the beneficiary; and, in order to preclude the complications that would arise from allowing a trust upon a trust, we would say that the subject-matter must not be a mere beneficial interest under a subsisting trust.

We think the Bill should provide for disclaimers by proposed beneficiaries.

Chapter III: Of the Duties and Liabilities of Trustees.—In the section (11) relating to the trustee's duty to fulfil the purpose of the trust, we would insert an explanation that the purpose of a trust for the payment of debts should, unless a contrary intention is expressed, be deemed to be to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death, and in the case of debts not bearing interest, to make such payment without interest.

When a beneficiary's interest is forfeited to Government, we think that the trustee should be bound to hold the trust-property for the benefit of such person, in such manner as the Government directs.

Chapter IV: Of the Rights and Powers of Trustees.—We think that the prohibition (section 32) as to enforcing a trustee's charge upon the trust-property for proper expenses paid out of his own pocket should not apply where the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction.

We think that the section (33) entitling the trustee to be indemnified by the gainer by a breach of trust should expressly exclude this right when the trustee has, in committing the breach, been guilty of fraud.

As to the management of the trust-property (section 36), we think that, for the purposes of the Land Improvement Act, 1871, every trustee in the actual receipt of the rents and profits of land should be deemed to be a landlord. A similar provision is contained in the English Statute 27 & 28 Vic., c. 114. We consider that, except with the permission of a principal Civil Court of original jurisdiction, no trustee should have power to lease trust-property for a term exceeding twenty-one years.

We would enable the trustee, with the permission of the Court, but not otherwise, to apply the trust-property, in whole or in part, to the advancement in life of a minor beneficiary.

Where power to deal with the trust-property is given to several trustees and one of them disclaims or dies, the Bill should, in our opinion, provide that the power may be exercised by the continuing trustees, unless, from the terms of the instrument of trust, it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

Chapter V: Of the Disabilities of Trustees.—The Bill declares (section 46), in accordance with the present law, that, where there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides. Mr. West is of opinion that the rule ought to be that, in the absence of a direction to the contrary, a majority of the trustees may act subject to control by the Court on application by the minority. We think that the section declaring that no trustee whose duty it is to sell trust-property may buy the same should be extended to the agents employed by such trustees for the purpose of the sale. Of the two alternative rules given in the Bill, as to when the trustee may buy the trust-property, we consider that printed in the text to be best adapted for India (namely) :—

"No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

"And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for his beneficiary may buy it or obtain amortgage or lease of it for himself."

Chapter VI: Of the Rights and Liabilities of the Beneficiary.—The Bill declares (section 56) that the beneficiary, if competent to contract, may transfer his interest, subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of it. Mr. West considers that the beneficiary should not be allowed to substitute a trust in favour of another for one in his own favour without the assent of the trustee, except in the case of a passive trust.

We think that to the section (58) declaring the beneficiary's right to proper trustees, and a proper number of trustees, the following explanations may usefully be added :—

"*Explanation I.*—The following are not proper persons within the meaning of this section :

"A person domiciled abroad; an alien enemy; a person having an interest inconsistent with that of the beneficiary : a person in insolvent circumstances; and, unless the personal law of the beneficiary provides otherwise, a married woman and a minor.

"*Explanation II.*—When the administration of the trust involves the receipt and custody of the money, the number of trustees should be two at least."

With regard to the first of these explanations, we would observe that in Hindú and Muhammadan families, a minor son often succeeds to property burdened with a trust for dependent relations of his father, and a married woman is sometimes made by her father trustee for herself and her son or daughter.

Where a trustee has wrongfully bought trust-property, the beneficiary has, under certain circumstances, a right to have the property declared subject to

the trust or re-transferred. We think that to the section (61) embodying this rule should be added a clause saving the rights of lessees and others who, before the institution of a suit to have the property declared subject to the trust or re-transferred, have contracted in good faith with the trustee or his sub-purchaser (8 B. P. C. 42), and disallowing the right to a declaration or retransfer when the beneficiary has ratified the sale to the trustee, with full knowledge of the facts of the case and of his rights as against the trustee.

The section (62) enabling the beneficiary to follow trust-property saves transferees in good faith for consideration without notice of the trust, and a transferee for consideration (with or without notice) from such a transferee. Mr. West would also save a gratuitous transferee from a *bonâ fide* transferee for value, and a transferee *bonâ fide* for value from a volunteer.

Where the trustee wrongfully mingles trust-property with his own, we would adopt the rule given in the margin of the Bill, section 65, namely, that the beneficiary is entitled to a charge on the whole fund for the amount due to him. It accords with the decision in *Cook* v. *Addison*, L. R. 7 Eq. 471.

It seems to us that section 68 should be extended to the cases where one of several beneficiaries (1) knowingly obtains any advantage from a breach of trust, without the consent of the other beneficiaries, or (2) becomes aware of a breach, and either actually conceals it or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or has deceived the trustee and thereby induced him to commit a breach; and that in such case the other beneficiaries should be entitled to have his interest under the trust impounded.

Chapter VII: Of Vacating the Office of Trustee.—It seems unnecessary to require a trustee desiring to be discharged by the Court to institute a suit for that purpose. It will be enough to require him to present a petition.

We think express provision should be made for the appointment of a new trustee in place of one disclaiming or accepting an inconsistent trust. Mr. West is of opinion that, if no provision has been made by the instrument of trust, the Court only should nominate the trustee.

Chapter VIII: Of the Extinction of Trusts.—The Bill should, we think, declare that no trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust (1 Coll. 655, 659). Mr. West considers that a trust should not be allowed to be revocable except on the same terms as a gift.

Chapter IX: Certain Obligations in the Nature of a Trust.— We doubt the expediency of attempting to suppress the inveterate practice of entering into *benámi* transactions: we would point out that in many, perhaps most, of those transactions the parties are actuated by religious or prudential, rather than fraudulent, motives; and we think that, in lieu of section 78, clause (*d*), and section 81. the Bill should simply declare that where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide the consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

We think that, in addition to the ten constructive trusts expressly set forth in the Bill, it should mention those that arise in the following cases:—

where a testator bequeaths certain property upon trust and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose:

where property is bequeathed, and the revocation of the bequest is prevented by coercion:

where property is transferred in pursuance of a contract liable to rescission or induced by fraud or mistake:

where any person, bound in a fiduciary character to protect the interests of another, enters into any dealings under circumstances in which his own interests are or may be adverse to those of such other person, and thereby gains for himself a pecuniary advantage:

where by the exercise of undue influence any advantage is gained, in derogation of the interests of another, without consideration or with notice that such influence has been exercised:

where a tenant for life or other qualified owner of property, as representing all persons interested therein, gains some advantage; and, lastly,

where creditors compound the debts due to them, and one of them, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors.

We think that some words should be inserted to show that a resulting trust cannot be implied in evasion of any law for the time being in force (*Ex p. Yallop*, 15 Ves. 60.)

Some of the rules applied by this chapter might conceivably be held to extend to the manager as such of an undivided family. We would therefore declare that nothing contained in the Act shall be deemed to affect the mutual relations of the members of undivided families as determined by any customary or personal law.

Mr. West is of opinion that the Bill should also provide for the following matters:—

(*a*) the constitution of trusts for alimentary provisions and the forfeiture of the interests of persons for whom such provisions have been made:

(*b*) the illegality of trusts (other than trusts for payment of debts, for keeping on foot a policy of life-insurance, or for public purposes) involving an accumulation of the proceeds of trust-property for more than twenty-one years:

(*c*) the power of a trustee to carry on a business, at the charge and risk of the beneficiaries, so far as may be necessary in order to its liquidation:

(*d*) the non-effect on the trustee's transactions of slight deviations by the trustee from his duty:

(*e*) the liability of a trustee of his own wrong, for losses and gains as well as for the trust-property.

He would also add, either to the Bill or to the Limitation Act, appropriate sections on limitation of certain suits relating to express or constructive trusts.

We annex a copy (marked D) of the Bill as (subject to the above remarks) we have revised it.

III

In conclusion, we have to recapitulate briefly the specific recommendations which we have made in this report:—

(*a*) that the process of codifying well-marked divisions of our substantive law should contiuue;

(*b*) that the eventual combination of those divisions as parts of a single and general Code should be borne in mind;

(*c*) that the English law should be made the basis in a great measure of our future Codes, but that its materials should be recast rather than adopted without modification;

(*d*) that in recasting those materials, due regard should be had to Native habits and modes of thought; that the form which those materials should assume should, as far as possible, resemble that of rules already accepted; that, in other words, the propositions of our Codes should be broad, simple, and readily intelligble;

(*e*) that uniformity in legislation should be aimed at, but that special and local customs should be treated considerately;

(*f*) that the existing law of persons should not at present be expanded by way of codification, save that the operation of the European British Minors Act, XIII of 1874, should be extended;

(*g*) that the laws relating respectively to negotiable instruments, to the subjects dealt with by the Transfer of Property Bill, to trusts, to alluvion, to easements, and master and servant, should be codified, and the Bills already prepared on these subjects be passed into law, subject to the amendments above suggested;

(*h*) that the Law of Wrongs should then be codified;

(*i*) that, concurrently with or after the framing of a Law of Wrongs, the laws relating to insurance, carriers and lien should be codified;

(*j*) that the legislature should then deal with the Law of Property in its whole extent;

(*k*) that preparation be made for a systematic chapter on interpretation;
(*l*) that the project of framing a digest of the decisions of Indian Courts should be abandoned.

WHITLEY STOKES. (L. S.)
C. A. TURNER. (L. S.)
RAYMOND WEST. (L. S.)

The 15th November 1879.

Note by SIR CHARLES TURNER *as to the proposal to give a special criminal jurisdiction in the case of Domestic and Agricultural Servants and Mechanics.*

I consider that where the misconduct of the servant amounts to a criminal act, *e.g.*, wilful damage or dishonesty, or intentional insult calculated to provoke a breach of the peace, the master is sufficiently protected by the provisions of the general law; that the peculiar character of the contract in establishing a personal relation is in itself a strong argument against the enactment of a special criminal law to enforce its obligations; that although a servant may by his poverty be unable to make compensation in damages for breach of contract, yet the power of the master to put an immediate termination to the contract ordinarily protects him against any serious damage for such breaches; that in the exceptional cases in which a master cannot at once supply the place of a servant whom he discharges, or who quits his service, the dependence of the master on the good-will of the servant will supply what is in this country sometimes wanting,—a valuable incentive to the master so to conduct himself towards the servant as to attach him to his service. The moral effect of criminal prosecution and punishment is so deteriorating to the character, that I would confine special legislation exposing servants to these penalties to cases which contain an element of fraud and are not sufficiently met by the general law, namely, where advances have been received for labour or materials and the work has not been executed; and in these cases I would still further restrict the penalties by allowing resort to them only where the advance has not been worked out or duly expended. I consider that, to force a man by terror of imprisonment in a criminal suit to serve for the whole period—it may be for years—for which he engages, if he has received a few rupees as an advance, an advance which may have been long ago recovered—is to accord the sanction of the law to a qualified form of slavery, justifiable only by political emergency, as in the case of enlistment in the army, and inconsistent with recent legislation in India, which abolishes imprisonment of any kind for the enforcement of other contracts or civil wrongs resulting in debts or measured in damages. I consider such legislation especially undesirable in this country, where ignorance of the language on the part of the master often leads to seeming disobedience on the part of the servant; where a dominant race of masters is from its circumstances encouraged to exercise arbitrary power over servants, where the servants can expect but little protection from the effect of public opinion in controlling his master's conduct, and where, among the lower grades of society, there are masters who have not been accustomed from their youth to fulfil the duties entailed by that relationship.

C. A. TURNER.

A.

THE TRANSFER OF PROPERTY BILL, 1879.

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THE SCHEDULE.

A

BILL

TO

Amend the law relating to the Transfer of Property by act of Parties.

[AS REVISED BY THE INDIAN LAW COMMISSION, 1879.]

Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; It is hereby enacted as follows:—

Preamble.

CHAPTER I.

PRELIMINARY.

Bill III, s. 1.

1. This Act may be called "The Transfer of Property Act, 1879:"

Short title.

It extends to the whole of British India;

Extent.

And it shall come into force on the first day of *March*, 1880.

Commencement.

Bill III, s. 2.

2. On and from that day the enactments specified in the schedule hereto annexed shall be repealed to the extent mentioned in the third column thereof. But nothing herein contained shall be deemed to affect—

Repeal of Acts.

Act IX of 1872, s. 1.

(*a*) the provisions of any enactment not hereby expressly repealed:

Saving of certain enactments, incidents, rights, liabilities, etc.

(*b*) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act and are allowed by the law for the time being in force:

4 Beng. A. C. 219.

(*c*) any right or liability arising out of a custom or personal law consistent with this Act, or out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability:

I. L. R. 2 Bom. 541.

(*d*) any transfer by operation of law or by decree or order of a Court of competent jurisdiction.

Bill III, s 3: Report, s. 2. N. Y. Code, para. 159.

3. In this Act, unless there be something repugnant in the subject or context—

Interpretation-clause.

"ownership"

"property:"

the "ownership" of a thing is the right of one or more persons to possess and use it to the exclusion of others. Such ownership is either absolute or qualified. The thing of which there may be ownership is called "property:"

Act III of 1877, s. 17, cl. (b).

"assurance"

"assurance:"

"assurance" means any non-testamentary instrument which purports or operates to create, transfer, or otherwise dispose of, whether in present or in future, any right, title or interest, to or in immoveable property:

"registered" means registered in British India under the law for the time being in force regulating the registration of documents :

"registered :"

"attached to the earth" means—

"attached to the earth."

(*a*) rooted in the earth, as in the case of trees and shrubs ;

(*b*) imbedded in or permanently resting upon the earth, as in the case of walls or buildings; or

See ss. 18, 44, clause (*s*), 61.

(*c*) attached to what is so imbedded or so rests, for the permanent beneficial enjoyment of that to which it is attached :

and a person is said to have "notice" of a fact when he actually knows that fact, or when but for wilful abstention from an inquiry which he ought to have made, or gross negligence, he would have known it or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, section 229.

"notice."

See Contract Act, s. 229, as to agent : 4 Cal. 212 : *v.* 11 Ben. 54 P. C.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

Bill III, s. 4.

Enactments relating to contracts to be taken as part of Act IX of 1872.

CHAPTER II.

Of Transfers of Property by act of Parties.

(*A*).—*Transfer of Property, whether moveable or immoveable.*

5. In the following sections "transfer" means an act by which one living person conveys to another, or to himself and another, in present or in future, the ownership of property or an interest therein, and "to transfer" is to perform such act.

N. Y. Code, s. 458.

"Transfer" defined.

6. The ownership of property of any kind may be transferred, except as otherwise provided by this section or by any other law for the time being in force :—

N. Y. Code, s. 460.

What may be transferred.

(*a*) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other merely contingent or possible right or interest, cannot be transferred to any one except the present or future owner or co-owner of the property affected thereby.

N. Y. Code, s. 461 : *Carlton* v. *Peighton*, 3 Mer : cf. Act X of 1877 ; s. 266, clause (*k*).

(*b*) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

N. Y. Code, s. 462 : *Smith* v. *Packhurst*, 3 Atk. 139.

(*c*) An easement cannot be transferred otherwise than by release to the owner of the servient heritage.

(*d*) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(*e*) A mere right to sue for compensation for a

fraud or for harm illegally caused to body, mind or reputation cannot be transferred.

cf. 11 & 12 Vic., c. 21, 27.

(*f*) A public office cannot be transferred, nor can the salary of a public officer whether before or after it has become payable.

(*g*) Stipends allowed to military and civil pensioners of Government and political pensioners cannot be transferred.

(*h*) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee.

Bill III, s. 5. Report, s. 4.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

Persons competent to transfer.

Bill III, s 6: Report, s. 10: *v.* last clause, Report, s. 6: 2 W. R. 125 (buildings): 14 W. R. 379.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in such property, and in the legal incidents thereof.

Operation of transfer.

N. W. P., 1870, p. 251: 24 W. R. 330 (trees), "everything grown on it," Morley N. S. 259.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor, but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the ownership passes.

N. Y. Code, s. 453: 7 Exch., 581.

9. A transfer may be made without writing in every case in which a writing is not expressly required by law.

Oral transfer.

Report, s. 47: L. R. 3. Chan. D. 148, 285.

10. Where a transfer is subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property transferred, the condition or limitation is void except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a married woman, so that she shall not have power to part with the same or her beneficial interest therein.

Condition restraining alienation.

11. Where on a transfer of property an interest is created in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. Act X of 1865, s. 125.

Restriction repugnant to interest created.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

12. Where property is transferred subject to a condition or limitation making any interest therein reserved or given to or for the benefit of any person to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void. Report, s. 48.

Condition making interest determinable on insolvency or attempted alienation.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

13. Where on a transfer of property an interest is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property. Act X of 1865, s. 100. Report, s. 49.

Transfer for benefit of person not in existence at date of transfer, subject to prior transfer.

Illustration.

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for his second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

14. No transfer can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong. Report, s. 50. Succession Act, s. 101.

Rule against perpetuity.

15. If on a transfer of property an interest is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails as regards the whole class. Report, s. 51. *Bentinck* v. *Duke of Portland*, 7 Chan. D. 693.

Transfer to class some of whom come under sections 13 and 14.

16. Where an interest fails by reason of any of the rules contained in sections 13, 14 and 15, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails. Report, s. 52.

Transfer to take effect on failure of prior transfer.

Transfer in perpetuity for benefit of public.

17. The restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

Act X of 1865, s. 104: Report, s. 53.

Direction for accumulation.

Donaldson v. Donaldson. L. R 3 Chan. Div. 743.

18. Where the terms of a transfer of property direct that the income arising therefrom shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

Report, ss. 56, 57, altered.

Vested interest.

19. Where on a transfer of property an interest is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

Report, s. 58, altered.

Transfer for benefit of person not then living.

20. Where, on a transfer of property, an interest is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

Act X of 1865, s. 107. Report, s. 59. IX, 72-33.

Contingent interest.

21. Where, on a transfer of property, an interest is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where under a transfer a person becomes entitled to an interest in property upon attaining a particular age, and the transferor also

gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Act X of 1865, s. 108. Report, s. 60.

Transfer to members of a class who attain a particular age.

22. Where, on a transfer of property, an interest is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Act X of 1865, s. 111. Report, s. 61.

Transfer contingent on happening of specified uncertain event.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Act X of 1865, s. 112.

Transfer to such of certain persons as survive at some period not specified.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

Act X of 1865, s. 113. Act X of 1865, s. 114, expanded with reference to Act IX of 1872, s. 23.

Conditional transfer.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfillment of the condition is impossible, or is forbidden by law, or is of such a nature that if permitted it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations.

(*a*) A lets a farm to B on condition that he shall walk 10 miles in an hour. The lease is void.

(*b*) A gives Rs. 500 to B on condition that he shall marry A's daughter, C. At the date of the transfer C was dead. The transfer is void.

(*c*) A transfers Rs. 500 to B, on condition that she shall murder C. The transfer is void.

(*d*) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

Act X of 1865, s. 115.

Fulfillment of condition precedent.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(*a*) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B has fulfilled the condition.

(*b*) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

Act X of 1865, s. 116.

Conditional transfer to one person coupled with transfer to another on failure of prior transfer.

27. Where, on a transfer of property, an interest is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another if the prior interest under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

Act X of 1865, s. 117.

But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(*a*) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and if he should neglect to do so, to C. B dies in A's lifetime. The transfer to C takes effect.

(*b*) A transfers property to his wife; but in case she should die in his lifetime, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The transfer to B does not take effect.

Act X of 1865, s. 118.

Ulterior transfer conditional on happening or not happening of specified event.

28. On a transfer of property an interest may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen, such interest shall pass to another person; or that in case a specified uncertain event shall not happen, such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five and twenty-seven.

Act X of 1865, s. 119.

Fulfillment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

Act X of 1865, s. 120.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to B for her life, and, if she do not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

31. Subject to the provisions of section twelve, on a transfer of property an interest may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen. Act X of 1865, s. 121.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

Illustrations.

(*a*) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(*b*) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. A does not go to England within the term prescribed. His interest in the farm ceases.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest. Act X of 1865, s. 122.

Such condition must not be invalid.

33. Where, on a transfer of property, an interest is created subject to a condition that the person taking it shall perform a certain act at or before a specified time, and the transferor has at the time of creating the interest made an ulterior disposition thereof in favour of himself or of another if the act be not performed within such time, the prior disposition ceases to have effect if the act is not performed within such time, or if the person benefited by the prior disposition renders the performance of the act impossible within the time specified. But where the transferor has not made any such ulterior disposition thereof, the transfer is, at the option of the transferor, voidable so far as regards such interest, if it was intended that time should be of the essence of the condition ; but if it was not so intended, the transfer shall not be so voidable. Act X of 1865, s. 124.

Condition that transferee shall perform act at or before specified time.

The intention referred to in this section is, in the case of a transfer without consideration, the intention of the transferor, and, in the case of a transfer for consideration, the intention of both the transferor and of the person from whom the consideration proceeds.

When such intention is apparent, the circumstance that the interest has actually been enjoyed under the prior disposition does not affect the operation of the condition.

34. Where, on a transfer of property, an interest is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, if the transferor has at the time of the transfer made an ulterior disposition of the interest in favour of another person, the prior disposition ceases to take effect when the person benefited thereby renders impossible or indefinitely postpones the performance of the condition.

Transfer conditional on performance of act, no time being specified for performance.

But if the transferor has not at the time of the transfer made any such ulterior disposition of the interest, then if the interest was created without consideration it is voidable at the option of the transferor; but if it was created for consideration it shall be so voidable only if adequate compensation for the breach of the condition cannot be made in money.

Transfer conditional on performance of act time being specified.

35. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer is enjoyed by him, or as a condition on the non-fulfillment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfillment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then if its performance is by the fraud of a person interested in the non-fulfillment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Election.

Report, s. 62, added to: 2 Spence 585.

Election when necessary.

36. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

Act X of 1865, s. 168.

subject nevertheless,

where the transfer is gratuitous and the transferor has before the election died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustration.

The farm of Sultánpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

Act X of 1865, s. 169.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

Act X of 1865, s 171.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom. Act X of 1865, s. 172.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer expressed to be in lieu of that property, if such owner claim that he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he has knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances. Act X of 1865, s. 173.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent. Act X of 1865, s. 174.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done. Act X of 1865, s. 175.

Illustration.

A transfers B an estate to which C is entitled, and to C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer. Act X of 1865, s. 176.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority. Act X of 1865, s. 167.

Apportionment.

37. In the absence of a contract to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof. Report, s. 64; Bill III, s. 86.

Apportionment of periodical payments on determination of interest of person entitled,

Severance of Obligation relating to Property.

38. When in consequence of a transfer property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a

Satisfaction of right arising in favour of several persons in consequence of a transfer.

whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Illustrations.

(*a*) A sells to B, C and D land situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one-quarter each. E having notice of this must pay Rs. 15 to B, Rs. 7½ to C and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C and D.

(*b*) Each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all according to such directions as B, C and D may join in giving.

B. Transfer of immoveable property.

Bill III, s. 7.

Transfer by person authorized only under certain circumstances to transfer.

39. Where any person authorized only under circumstances in their nature variable to dispose of immoveable property transfers such property for consideration, alleging the existence of such circumstances they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindú widow, whose husband has left collateral heirs, agrees, for purposes neither religious nor charitable, to sell a field, part of the property held by her as such, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Wilson *v.* Hare, L. R. 1 Ch. Richards *v.* Renell, 7 Ch. Div. 224. Maclean *v.* Mackay, L. R. 5 P. (32). S. A. 135 of 1877.

Transfer of land where third person is entitled to maintenance.

40. Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such right does not amount to a charge on such property, or

or has a right to restrain its enjoyment,

where for the more beneficial enjoyment of his own immoveable property a third person has, independently of any interest in the immoveable property

of another, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

or is entitled to benefit of obligation not amounting to interest or easement.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustrations.

(*a*) A, a Hindú, transfers Sultánpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having succeeded to her deceased husband's property, and agrees with her that if she is dispossessed of Sultánpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultánpur. She has no claim on the villages transferred to C.

(*b*) A, a Hindú widow, is entitled to maintenance out of the share of her deceased husband in Basaoli, which has passed to his brother B. B sells Basaoli to C, who has notice of A's claim and that there is no other property to satisfy it. A may claim maintenance out of Basaoli in the hands of C.

(*c*) A contracts to sell Sultánpur to B. While the contract is still in force he sells Sultánpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

41. Where a person holding immoveable property as its ostensible owner with the consent, express or implied, of the other persons interested therein transfers such property for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Bill III, s. 7. Act IX of 1872, s. 108. excepn. 2.

Transfer by ostensible owner.

Illustrations.

(*a*) A, one of two co-proprietors of village land, leaves his village, and with his consent the land is registered by the Revenue-officer in the name of B, the other co-proprietor. After ten years B sells a portion of the land to C, who takes reasonable care to ascertain that B had power to make the transfer and acts in good faith. A is not entitled to have the sale set aside.

(*b*) A buys land and causes it to be transferred to his servant B to hold on his behalf, and also causes it to be entered in the revenue register in B's name. C, having ascertained that B is the registered owner of the land and pays the revenue due in respect thereof, buys the land in good faith. A cannot impeach the sale.

42. Where a person having an option to require, or authority to revoke, a transfer of any immoveable property, transfers the property for consideration such transfer operates in favour of the transferee (subject to any condition attached to the exercise of the option or authority) in the former case as an

Bill III, s. 10A, para. 2.

Transfer by person having option to require or authority to revoke transfer.

exercise of the option, and, in the latter case, as a revocation of the former transfer to the extent of the authority.

Illustrations.

(*a*) A takes a lease of a house from B with an option of buying it at a specified price. A sells the house to C. C may require B to transfer it to him at the specified price.

(*b*) A lets a house to B and reserves power to revoke the lease if in the opinion of a specified surveyor B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

Canadian Code, s. 1488.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

Sugd. V. and P., 13th edn., 297.

43. Where a person erroneously represents that he is authorized to transfer certain immoveable property, and assumes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindú who has separated from his father B, sells to C three fields, X, Y and Z. Of these Z does not belong to A, it having been retained by B on the partition; but on B's dying A obtains Z as heir. C, not having rescinded the contract of sale, may require A to deliver Z to him.

Bill III, s. 9.

Transfer by one co-owner.

44. Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Bill III, s. 18.

Joint transfer for consideration.

45. Where property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled to the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Illustration.

A and B are the sons and C the grandson of a Hindú who has died leaving property. C's father D has also died. A partition has been made after which A and B have reunited. C remains severed in interest, his share being one-third. The separate property of D is of the same value. The whole fund belonging to A, B and C is expended in buying an estate X. A and B take one moiety of X as joint estate and C takes the other moiety as separate property.

Transfer for consideration by persons having distinct interests.

46. Where a transfer of immoveable property is made for consideration by persons having distinct interest therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property transferred were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations.

(*a*) A owning a moiety, and B and C, each a quarter share of mauza Sultánpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mauza.

(*b*) A, being entitled to a life interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs. 1,000. A's life interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase money, B and C to receive Rs. 400.

Transfer by co-owners of share in common property.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Illustration.

A, the owner of an eight-annas share, and B and C, each the owner of a four-annas share, in mauza Sultánpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-annashare is taken from the share of A, and half an anna share from each of the shares of B and C.

Priority of rights created by transfer.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Transferee's right under policy.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under

Bill III, ss. 17, 36.

the policy, or so much thereof as may be necessary to be applied in reinstating the property.

Bill III, s. 8: Act XI of 1855, s. 1.

Rent *bonâ fide* paid to holder under defective title.

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Act XI of 1855, s. 2: 2 Bomb. 225.

Improvements made by *bonâ fide* holders under defective titles.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee or his representative in interest has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When under the circumstances aforesaid the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to reap and carry them.

Bill III, s 10: 8 Beng. 478: 7 Mad. 111: 11 Bom 24, 64, 139: N.-W. P., 1867, p. 301: 10 W.R 469: 7 W.R. 225: 15 W.R. 372: 23 W.R. 382: 2 Tayl. & Bell 113: 1 O'Kin. 303, 309: 5 W. R. P.C. 63: 8 Bom. A. C. J. 61: *Berry* v. *Gibbons*, L. R. 8 Ch. 747.

Transfer of property pending suit relating thereto.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Bill III, s. 10A: Cf. Act I of 1877, s. 35.

Fraudulent transfer.

53. Every transfer or forfeiture of immoveable property made or incurred with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners, or other persons having an interest in such property or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Where the effect of any transfer or forfeiture of immoveable property is to defraud, defeat or delay any such person, and such transfer or forfeiture is made or incurred gratuitously or for a grossly inadequate consideration, the transfer or forfeiture may be presumed to have been made or incurred with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee or person benefiting by the forfeiture in good faith and for consideration or the rights of Government arising on any forfeiture for non-payment of land-revenue.

CHAPTER III.

Of Sales of Immoveable Property.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

"Sale" defined.

Such transfer, in the case of immoveable property of the value of one hundred rupees and upwards, can be made only by a registered assurance.

Sale how made.

In the case of immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered assurance or by delivery of the property.

Delivery of immoveable property takes place in the case of a reversion or other intangible thing—when the parties consent to the delivery; and in the case of other immoveable property—when the seller places the buyer, or such person as he directs in possession of the proper.

Bill III, s. 11; 14 Beng. 307, 312 : N.-W. P., 1866, p 87; 12 Suth. W.R. P., C. 6 : as to the delivery of assurance, W.R. 1864, p. 222 : 5 W. R.248; Morley N S. 358.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

Contract for sale.

Right to redeem, N.-W. P., 1868, p. 376.

It does not, of itself, create any interest in or charge on such property.

Bill III, s. 14.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

Bill III, s. 12, Report, s. 14.

Rights and liabilities of buyer and seller.

(*a*) The seller is bound—

(1) to disclose to the buyer any defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;

Bill III, s 13 (*a*).

(2) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;

Bill III, s. 13 (*a*).

Bill III, s. 12 (a). (3) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;

Bill III, s. 12 (b). (4) on payment or tender of the amount due in respect of the price, to execute a proper assurance of the property when the buyer tenders it to him for execution at a proper time and place, and where, the property is, or forms part of, a revenue-paying estate, to present an application to the proper officer for the requisite alteration of the revenue-register ;

New.

(5) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;

(6) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

Bill III, s. 12 (g). (7) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date ; and, where the property is sold free from incumbrances, to discharge all incumbrances on the property then existing ; and

Bill III, s. 12 (i). (8) where the ownership of the property has passed to the buyer, to deliver to the buyer all documents of title relating thereto which are in the seller's possession or power :

provided that (1), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (2), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (1) the seller, and in case (2) the buyer, of the lot of greatest value is bound, upon every reasonable request by the buyer or by any of the other buyers, as the case may be, or by any person claiming under him, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof as he may require ; and, in the meantime, the seller or the buyer, as the case may be, of the lot of greatest value must keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident ;

Bill III, s. 12 (j). (9) and the Seller shall be deemed to contract that the interest which he assumes to transfer to the buyer subsists and that he has power to transfer the same :

provided that where the sale is made by a person in a fiduciary character, he shall be deemed to contract to the like effect, so far only as his knowledge extends.

(*b*) The seller is entitled—

Bill III, s. 12 (b). (1) to the rents and profits of the property till the ownership thereof passes to the buyer ;

ill III, s. 12 (d). (2) where the ownership of the property has passed to the buyer before payment of the whole of

the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.

(*c*). The buyer is bound—

(1) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is, and the seller is not, aware, and which increases the value of such interest; Bill III, s. 13 (*b*).

(2) to pay or tender, at the time and place of completing the transfer, the purchase-money to the seller or such person as he directs: provided that where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of the incumbrances on the property existing at the date of the transfer, and shall pay the amount so retained to the persons entitled thereto; Bill III, s. 12 (*g*). Canadian Code, s. 1533.

(3) to retransfer the property where the ownership thereof has passed to the buyer before payment of the purchase-money and he fails to pay or tender such money in accordance with the last preceding clause;

(4) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller; Bill III, s. 12 (*c*).

(5) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on the incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due. Bill III, s. 15.

(*d*) The buyer is entitled—

(1) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof; Bill III, s. 12 (*c*).

(2) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller, to the extent of the seller's interest therein, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission. Bill III, s. 12. (*e*).

An omission to make such disclosures as are mentioned in this section, paragraph (*a*), clause (1), and paragraph (*c*), clause (1), is fraudulent. Bill III, s. 13.

Sale of one of two properties subject to a common charge.

56. Where two properties are subject to a common charge, and one of the properties is sold to a buyer without notice of the charge the buyer is, as against the seller and the incumbrancer, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend. Bill III, s. 19.

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

Bill III, s. 21: Act XXVIII of 1866, s. 19: 23 & 24 Vic., c. 145, s. 24:

"Mortgage," "mortgagor" and "mortgagee" defined.

57. (*a*) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

English practice followed, with necessary modifications, 5 Bom. A. C. J. 109.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured are called the mortgage-money, and the assurance (if any) by which the transfer is effected is called a mortgage-deed.

Mortgagor need not have present ownership, N.-W. P., 1872, p. 11, *sed qu.* 12 Moo. I. A. 275, 306. Colebr. Dig. B. i, c. III, t. 96.

Simple mortgage.

(*b*) Where the mortgagor binds himself expressly and personally to repay the mortgage-money on a certain date, and, without delivering possession of the property, makes it a collateral security for the repayment, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Mortgage by conditional sale.

(*c*) Where the mortgagor, without delivering possession of the property, ostensibly sells it—

on condition that on default of payment of the mortgage-money on date agreed on the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

Usufructuary mortgage.

(*d*) Where the mortgagor delivers or agrees to deliver actual possession of the mortgaged property to the mortgagee on the terms that he shall retain such possession until repayment of the mortgage-money, applying the rents and profits accruing from such property in reduction of the amount for the time being due under the mortgage, or accepting such rents and profits in lieu of interest, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

Macph. 8, 12, 59: R. B. Ghose 218, 219: 2 Moo. I. A. 487.

English mortgage.

(*e*) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a condition that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

Bill III, s. 22. See Macph. 53:

Mortgage when to be by assurance.

58. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by registered assurance sign-

ed by the mortgagor and attested by at least two witnesses. R. B. Ghose 64 : This applies to defeasances.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by registered assurance signed and attested as aforesaid or by delivery of the property.

Rights and Liabilities of Mortgagor.

59. At any time after the principal money has become payable, the mortgagor, or, where there are more mortgagors than one, any of the mortgagors, has a right, on payment or tender, at a proper time and place, of all sums (if any) remaining due on the mortgage, to require the mortgagee (*a*) to re-deliver the mortgage-deed, if any, (*b*) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (*c*) at the cost of the mortgagor either to re-transfer the mortgaged property to him, or to execute, and (where the mortgage has been effected by registered assurance) to have registered, an acknowledgment in writing that any right in derogation of his ownership or other interest transferred to the mortgagee has been extinguished :

Right of mortgagor to redeem.

Bill III, s. 23 5 Beng. 450 : 6 Beng. 562 : 2 Mad. 420 : 7 Mad. 395 : In Cen. Provs. 13 Beng. 205. N.-W. P., 1868, p. 204 : Bomb. 237 : no redemption before expiration of period named. Redemption after fixed time has expired, 9 Bomb. 69. : See 7 Ben. 136 (P. C.)

provided that the right conferred by this section has not been extinguished by act of the parties or by order of a court. 6 Bom. A.C.J. 265 : N.-W. P., 1869, p. 128.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagee.

Redemption of portion of mortgaged property.

N. W. P., 1867, p. 88. 20 W.R. 387 : 22 W.R. 262 : 24 W. R. 24 : N.-W. P. 1870, p. 4 : N.-W. P., 1872, p. 92 : N.-W. P., 1873, p 148 : R. B. Ghose 198 : 15 Bengal 303.

60. If the owner of two or more properties makes separate mortgages on them by separate assurances, each mortgage may, in the absence of a contract to the contrary, be dealt with irrespectively of the other though the mortgages are made in favour of the same mortgagee.

Right to redeem one of two properties separately mortaged.

Bill III, s. 29 : *contra*, 6 Bom. A.C. J. 90. But see R. B. G. 330, 331.

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000 making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

61. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property—

Right of usufructuary mortgagor to recover possession.

Bill III, s. 23, clause (*c*).

(*a*) where the mortgagee is authorized to pay himself from the rents and profits of the property the principal money and interest thereof,—when such money and interest are paid ;

(*b*) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money,—when the term (if any) prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in the court as hereinafter provided.

Bill III, s. 25. 10 Bom. 369. 11 Bom. 32.

Accession to mortgaged property.

62. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession acquired in virtue of the transferred ownership.

Where such accession has been acquired at the cost of the mortgagee, and is capable of separate possession or enjoyment without determent to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the cost of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable in the case of an acquisition necessary to preserve the property from destruction, forfeiture, or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the cost of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

Illustration.

10 Bom. 369, 371, and see N.-W. P., 1866, p. 281.

A mortgages to B a field, the trees on which are the property of Government. B enters into possession of the field and as occupant thereof buys the trees. A redeems the field. He is entitled to the trees on payment of their cost.

Bill III, s. 26.

Renewal of mortgaged lease

63. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, have the benefit of the new lease.

Bill III, s. 24: N.-W. P., 1867, p. 199.

Implied contracts by mortgagor.

64. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee,

(*a*) that the interest which the mortgagor assumes to transfer to the mortgagee subsists and that the mortgagor has power to transfer the same;

S. D. A. 1857, p. 1195; 1853, p. 575.

(*b*) that the mortgagor will defend, or if the mortgagee be in possession, enable him to defend the mortgagor's title to the mortgaged property;

Effect of for

(*c*) that the mortgagor will pay all public charges accruing due in respect of the property

(*d*) and, where the mortgaged property is a

ease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists, pay the rent reserved by the lease, or if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

feiture of lease. N.-W. P., 1869, p. 128.

(*e*) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

Nothing in clause (*c*), or in clause (*d*), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage.

65. A mortgagor in possessson of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Bill III, s. 27.

Waste by mortgagor in possession.

Macph. 109: R. B. Ghose 147.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Lewin on Trusts, p. 263.

Rights and Liabilities of Mortgagee.

66. In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.

Bill III, s. 30. 2 Mad. 289: N.-W. P., 1870, p. 311: No foreclosure before expiration of period named 2 Bomb. 242: Mortgagee's right to sale, 7 Bomb. A. C. J. 146: 9 Bomb. 12.

Right to foreclosure or sale.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

(*a*) to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale; or

Simple mortgagee, N.-W. P. 1869, p. 184: Usufructuary, N.-W. P. 1875, p. 55.

(*b*) to authorize a mortgagor who holds the mortgagee's rights as his trust or legal representative and who may sue for a sale of the property to institute a suit for foreclosure; or

Fisher 518, 575: Qy. as to conditional mortgagees.

(*c*) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

Cases *contra*, Macph. 195, 196.

(*d*) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property: unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

Bill III, s. 34.

67. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only:—

Right to sue for mortgage-money.

6 W. R. 283.

(*a*) where the mortgagor binds himself to repay the same:

Macph. 233. Act XXXIII of 1871, s. 46: 25 W. R. 7 (partial deprivation).

(*b*) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor:

4 Moo. I. A. 464: Marsh. 209: 7 S. D. A. 47: N. W. P. 1860, p. 28: So in the case of a Kánam mortgage, 2 Mad. 315: 6 W. R. 283 (power to usufructuary mortgagee).

(*c*) where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section sixty-five, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and if the mortgagor fails so to do, may sue him for the mortgage-money.

Bill III, s. 35. SB om. A. C. J. 142: Muhammadan law, Macph. 2.

68. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling the mortgaged property, or any part thereof, is invalid, except where—

Power of sale when invalid.

(*a*) the principal money originally secured is five hundred rupees or upwards; or

(*b*) the mortgagee is the Secretary of State for India in Council; or

(*c*) the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karáchí or Rangoon.

Act No. XXVIII of 1866, section 6, is repealed so far as it is inconsistent with this section.

Bill III, s. 37: 11 Bomb. 32.

69. If, after the date of the mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Accession to mortgaged property.

Illustrations.

(*a*) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(*b*) A mortgages a certain plot of building-land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

Renewal of mortgaged lease.

70. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease. Bill III, s. 38

Rights of mortgagee in possession.

71. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary— Bill III, s. 39.

(*a*) for the due management of the property and the collection of the rents and profits thereof; Macph. 109, 113, 252: 1 Bomb. 199, 203; 5 Bomb. A. C. J. 109, 116.

(*b*) for its preservation from destruction, forfeiture of sale; N.-W. P., 1867, p. 187.

(*c*) for supporting the mortgagor's title to the property; 1 W. R. 133.

(*d*) for making his own title thereto good against the mortgagor; and

(*e*) when the mortgaged property is renewable leasehold, for the renewal of the lease; 11 Moo. I. A. 241.

and may, in the absence of a contract to the contrary, add such money to the principal-money at the rate of interest payable on the principal and where no such rate is fixed at the rate of nine per cent. per annum.

Where the property is by its nature insurable at ordinary rates, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property, and add the premiums paid for any such insurance to the principal-money at the same rate of interest. 23 & 24 Vic., c. 145, s. 11. 2 Dav. 606.

Charge on proceeds of revenue sale.

72. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part. Bill III, s. 42: Macph. 113, 234: I. W. R. 270. 16 W. R. 222.

Right of subsequent mortgagee to pay off prior mortgagees.

73. Any second or other subsequent mortgagee may at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender. Bill III, s. 43: Report, ss. 31, 33.

Rights of mesne mortgagee against prior and subsequent mortgagees.

74. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged pro- Bill III, s. 58.

perty, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

Bill III, s. 39.

75. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

Liabilities of mortgagee in possession.

2 Bom. 222: Act IX of 1872, s. 151: Fisher, s. 1530.

(*a*) he must manage the property as a person of ordinary prudence would manage it if it were his own;

8 Chan. Div. 427: N.-W. P., 1875, p. 100.

(*b*) he must use his best endeavours to collect the rents and profits thereof;

2 Bomb. 231. Macph. 113, 119.

(*c*) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent, in default of payment of which the property may be summarily sold;

9 W. R. 488: 4 Y. & C. Appendix, 507: Fisher, s. 1530.

(*d*) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (*c*) and the interest on the principal-money;

Bill III, s. 41.

(*e*) he must not commit any act which is destructive or permanently injurious to the property;

Macph. 118, 119, citing 7 N.-W. P. 436; 9 N.-W. P. 1: Act I of 1877, s. 54.

(*f*) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property;

2 Beng. P. C. 55; 5 W. R. 53, 271, *&c.*: Macph. 119.

(*g*) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;

5 Bomb. A. C. J. 196: 12 Bomb. 88: 10 Beng. 386: N.-W.P. 1866, p. 132; *ibid.* 1868, p. 153: When he cultivates, 7 W. R. 244; R. B. Ghose 262. 2 Moo. I. A. Ca. I.

(*h*) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (*c*), (*d*), and (*e*), and interest thereon be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money. The surplus (if any) shall be paid to the mortgagor;

Macph. 159, 160.

(*i*) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest

time when he could take such amount out of court, as the case may be.

Loss occasioned by his default.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss (if any) occasioned by such failure. Bill III, s. 33, last para.

Receipts in lieu of interest.

76. Nothing in section seventy-five, clauses (*b*), (*d*), (*g*), and (*h*), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken, in lieu of interest on the principal-money, or of such interest and defined portions of the principal. Bill III, s. 40 Sev. 333. See 10 Moo. I. A. 340.

Priority.

Postponement of prior mortgagee.

77. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee. Bill III, s. 44 Evidence Act, s. 115: N.-W.P.1868. p. 402: 4 Mad. 373: 2 Moo. I. A. 487: II W. R. 286: Hindu mortgagee in possession, 8. Bomb. A. C. J. 50, 55, in Guzerat, 11 Bomb.

Mortgage to secure uncertain amount when maximum is expressed.

78. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account expresses the maximum to be secured thereby, a subsequent mortgage on the same property shall, if made with notice of the prior mortgage, or if the instrument effecting the prior mortgage is registered, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage. Bill III, s. 25. Report, s. 29.

Illustration.

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur, to C, to secure Rs. 10,000; and C gives notice thereof to B & Co. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

Tacking abolished.

79. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by seciton seventy-eight, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, Bill III, s. 46: Report, s. 34: 2 Beng. App. 45: 5 Beng. 463: 11 W. R. 310.

shall thereby acquire any priority in respect of his security for such subsequent advance.

Marshalling and Contribution.

Fisher 704: Bill III, s. 47: W. R. 1864, p. 374: I. W. R. 353: 7 W. R. 483: 12 W. R. 114: Macph. 205. Macph. 136.

Marshalling securities.

80. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, so far as such property will extend; but not so as to prejudice the rights of the first mortgagee or of any other person having an incumbrance on either property.

Bill III, s. 48. Fisher 700.

Contribution to mortgage-debt.

81. Where several properties, whether of one or several owners, are mortgaged to secure one debt, each property is liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is liable to contribute rateably to the latter debt, after deducting the amount of the former debt from the value of the property out of which it has been paid.

Fisher 701.

Nothing in this section applies to a property liable under section eighty to the claim of the second mortgagee.

Deposit in Court.

Bill III, s. 23: Beng. Reg. I of 1798, s. 2: Macph. 171.

Power to deposit in court money due on mortgage.

82. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any court in which he might have instituted such suit, to the account of the mortgagee the amount remaining due on the mortgage.

Bill III, s. 23: Beng. Reg. I of 1798, s. 2: Macph. 171.

Right to money deposited by mortgagor.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Bill III, s. 32: 9 N.-W. P. 1. Macph. 159, 160.

Cessation of interest.

83. When the mortgagor or such other person as aforesaid has tendered or deposited in court under section eighty-two the amount remaining due on the

mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of court, as the case may be.

Suits for Foreclosure, Sale or Redemption.

84. Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter, relating to such mortgage: provided that the plaintiff has notice of such interest.* Bill III, s. 49

Parties to suits for foreclosure, sale and redemption.

Foreclosure and Sale.

85. In a suit for foreclosure, if the plaintiff succeed, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree, Bill III, s. 50.

Degree in foreclosure-suit.

and ordering that, upon the defendant paying to the plaintiff or into court the amount so due, on a day within six months from the date of declaring in court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

86. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-three, the defendant shall (if necessary) be put into possession of the mortgaged property. Bill III, s. 5

Procedure in case of payment of amount due.

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* 14 Moo. I. A. 101: 1. W. R. 176: 21 W. R. 428: explained by Macph. 146: Seton i, 442, see Act X of 1877, sec. 32: 5 Bomb. O. C. J. 76 (legal representative of deceased mortgagor): 8 Beng. 104 (purchaser from mortgagor): Marshall 292, claimants of right of redemption, N.-W. P. 1868, p. 144.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, (if necessary), deliver possession of the property to the plaintiff.

Order absolute for foreclosure.

W. R. 91. Provided that the Court may, upon good cause shewn, and upon such terms (if any) as it thinks fit, from time to time postpone the day appointed for such payment.

Power to enlarge time.

On the passing of an order under the second paragraph of this section the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, schedule IV, No. 129, for the words "Final Decree" the words "Decree absolute" shall be substituted.

Bill III, sec. 52. **87.** In a suit for sale, if the plaintiff succeed, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-five, and also ordering that, in default of the defendant paying, as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is so found due to the plaintiff, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

Decree for sale.

Power to decree sale at instance of mortgagee.

In a suit for foreclosure, if the plaintiff succeed, the Court may at his instance pass a like decree in lieu of a decree for foreclosure.

When the mortgagee sues only for foreclosure, and not for foreclosure or sale, if the Court consider that he will not be damnified by a sale, and if the defendant furnishes such security as the Court thinks sufficient for the full and prompt payment of the balance due for the time being by him on the mortgage, the Court may, at the instance of the defendant, pass a like decree.

15 & 16 Vic., c. 86, s. 48.

Power to decree sale in foreclosure-suit at instance of mortgagor.

Bill III, s. 53. **88.** If in any case under section eighty-seven the defendant pays to the plaintiff or into court on the day fixed as aforesaid the amount due under the mortgage, the costs (if any) awarded to him and such subsequent costs as are mentioned in section ninety-three, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section eighty-seven; and thereupon the defendants

Procedure when defendant pays amount due.

Order absolute for sale.

right to redeem and the security shall both be extinguished.

Recovery of balance due on mortgage.

89. When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, the balance, if legally recoverable from the defendant otherwise than out of the property sold, may be recovered either (if the Court thinks fit) in the same suit in the same manner as under a decree for money, or by any other legal process open to the mortgagee. Bill III, s 54: Kent IV 207.

Redemption.

Who may sue for redemption.

90. Besides the mortgagor, any of the following persons may redeem or institute a suit for redemption of, the mortgaged property:— Bill III, s. 55.

(*a*) any person (other than the mortgagee) of the interest sought to be redeemed) having any interest in or charge upon the property ;

(*b*) any person having any interest in or charge upon the right to redeem the property; 3 W. R. 230: 6 W. R. 230, &c.

(*c*) any surety for the payment of the mortgage-debt or any part thereof; But see 17 W. R. 272.

(*d*) the guardian of the property of a minor mortgagor;

(*e*) the committee or other legal curator of a lunatic or idiot mortgagor;

(*f*) the judgment-creditor of the mortgagor, when he has obtained execution ;

(*g*) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property. Fisher, 768.

Decree in redemption-suit.

91. In a suit for redemption, if the plaintiff succeed, the Court shall pass a decree— Bill III, s. 56: See Code, C. P., s. 461: N.-W. P., 1870, p. 207.

ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree ; and

ordering that upon the plaintiff paying to the defendant or into court the amount so due on a day within six months from the date of declaring in court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall re-transfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property; but

that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary)

be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

Bill III, s. 57.

92. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-three, the plaintiff shall (if necessary) be put into possession of the mortgaged property.

In case of redemption, possession.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

In default, foreclosure or sale.

If he apply for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may (if necessary) deliver possession of the property to the defendant.

If he apply for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished:

Provided that the Court may, upon good cause shewn, and upon such terms (if any) as it thinks fit, from time to time, postpone the day fixed under section ninety-one for payment of the amount due.

Power to enlarge time.

Bill III, s. 59.

93. In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

Costs of mortgagee subsequent to decree.

Macph. 145.

94. Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the costs properly incurred in so redeeming and obtaining possession.

Charge of one of several co-mortgagors who redeems.

Sale of Property subject to prior mortgage.

Bill III, s.60: Report, s. 25 altered:

95. If any property the sale of which is directed under this chapter is subject to a prior mortgage, the Court may, with the consent

Sale of property subject to prior mortgage.

of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. Act X of 1877, s. 295.

Application of proceeds.

96. Such proceeds shall be brought into court and applied as follows :— Bill III, s. 61: See Act X of 1877, s. 295.

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

fifthly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

Anomalous Mortgages.

Mortgages not described in section 56, clauses (*b*), (*c*), (*d*), and (*e*).

97. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend by local usage. Bill III, s. 62, Bombay Reg. V of 1827, s. 15. No precise form is required for a mortgage,' 5 Beng. 272, per Couch, C. J.

Abandonment of security.

Abandonment of security by mortgagee selling mortgaged property.

98. Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches and brings to sale the mortgaged property, or the mortgagor's interest therein, he shall be deemed to have abandoned his security thereon, unless before the issue of the proclamation under the Code of Civil Procedure, section 287, he gives notice of such security to the Court executing the decree.

Charges.

Charges.

99. Where immoveable property of one person is by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore applied to a mortgagor shall, so far as many be, apply to the owner of such property, and all the provisions hereinbefore applied to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge. Bill III, s. 63.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

Bill III, s. 64: *Swinfen* v. *Swinfen*, 29. Beav. 199: *Adams* v. *Angell*, 5 Chan. D, 634, 645. 7 Mad. 231: 14 W. R. 491: 3 O'Kin. 184: 5 Beng. 463: 11 Bom. 41.

Extinguishment of charges.

100. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

Notice and Tender.

Service or tender on or to agent.

101. Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where no such person or agent can be found in the said district, or, where the person on or to whom such notice or tender should be served or made is unknown to the person required or desiring to serve the notice or make the tender, the latter person may apply to any court in which a suit might be brought for redemption of the mortgaged property, and such court shall direct in what manner such notice or tender shall be served or made, and any notice served or tender made in compliance with such direction shall be deemed sufficient.

Notice, etc., to or by person incompetent to contract.

102. Where under the provisions of this chapter a notice is to be served on or by, or tender or deposit made or accepted or taken out of court by any person incompetent to contract, such notice may be served or tender or deposit made, accepted or taken by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or tender or deposit made under the provisions of this chapter, application may be made to any court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of chapter XXXI of the Code of Civil Procedure shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

CHAPTER V.

Of Leases of Immoveable Property.

103. A lease of immoveable property is a trans-

Lease defined.

fer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

Duration of certain leases in absence of written contract or local usage.

104. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy. Bill III, s. 68: Report, s. 40: 5 Bom. A. C. J. 179: 6 *ibid*, 31; 7 *ibid*, *III*: and see 1 Beng. F. B. 25: 13 W. R. 190. I. L. R. 2 Calc. 146: 4 Beng. Appendix 86: 12 Beng. 263: N.-W. P. 1873, p. 9. Perry 480.

Notice to determine lease.

Every notice under this section must be in writing signed by or on behalf of the party giving it and tendered or delivered to the party who is intended to be bound by it, or affixed on a conspicuous part of the property.

Leases how made.

105. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered assurance.

All other leases of immoveable property may be made either by assurance or by oral agreement. Bill III, s. 65.

Right and liabilities of lessor and lessee.

106. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

A.—Rights and Liabilities of the Lessor.

(*a*) the lessor is bound to disclose to the lessee any defect in the property, with reference to its intended use, of which the former is, and the latter is not aware, and which the latter could not with ordinary care discover: Bill III s. 66. 6 W. R. 314.

(*b*) the lessor is bound on the lessee's request to put him in possession of the property leased: 6 Beng. Appendix 44, 39 (3): 15 W. R. 230; W. R. 121.

(*c*) the lessor shall be deemed to contract with the lessee that if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property leased during the time limited by the lease without interruption:

(*d*) where an arrear of rent is due from any lessee, the lessor may, instead of suing for the

39 (2) altered: Cf. IX of 1872. s. 93: 11 W. R. 278: 12 W. R. 149:

arrear, recover the same by distress and sale of the goods found in or upon the property in respect of which the arrear is due or of the produce of such property, but subject to the local law (if any) for the time being in force relating to distresses.

B.—Rights and Liabilities of the Lessee.

8 Beng. 73: 5 Calc. L. R. 33.

(*e*) if during the continuance of the lease any accession is made to the property leased, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease:

(*f*) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force any material part of the property leased be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

provided that if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision;

(*g*) if the lessor neglects to make, within a reasonable time after notice, repairs which he is bound to make to the property leased, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor:

(*h*) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property leased, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor:

Re *Thakoor Chunder Paramanick*, Beng. F. B. Rulings 595: 8 Beng. 237: 14 Beng. 201, 205: Canadian Code, s. 1640. Cf. Act XIX of 1868, s. 46: Act XVIII of 1873, s. 42.

(*i*) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth; provided he leaves the property leased in the state in which he received it:

(*j*) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property leased for the season current when the lease determines, and to free ingress and egress to reap and carry them:

5 S. D. A. 205: 5 Mad. 120 227: 7 Beng. 152, N.-W. P. 1875, p. 181: 12 W. R. 451: 16 W. R. 112: 6 S. D. A. 67. 15 W. R. 449.

(*k*) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property leased, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease:

8 Beng. 239: 12 Beng. 82.

nothing in this cause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of

a Court of Wards, to assign his interest as such tenant, farmer or lessee:

(*l*) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which increases the value of such interest:

(*m*) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf: See 23 W. R. 34.

(*n*) the lessee is bound to keep, and on the termination of the lease to restore, the property leased in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter into the property leased and inspect the condition thereof and give or leave notice of any defect in such condition, and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left:

(*o*) if the lessee becomes aware of any proceeding to recover the property leased or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:

(*p*) the lessee may use the property leased and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto: 5 Beng. 401, 416: 8 Beng. Appendix 70: 10 Beng. Appx. 41, sed, v. 5 S. D. A. 205. 15 W. R. 360: 17 W R. 416: 23 W. R. 298: W. R. Sp. (1864) 36 8 Chan, Div. 526.

(*q*) he must not, without the lessor's consent, erect on the property leased any permanent structure, except for agricultural purposes: 8 Beng. 242 14&15 Vic. c 25, s. 3.

(*r*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property leased.

107. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities, of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him: Bill III, s. 65, clause (*o*). 14 W. R. 83: 24 W. R. 68.

Rights of lessor's transferee.

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that if the lessee pay rent to the lessor without having reason to believe that such transfer has been made, Act XI of 1855, s. I: 4 Anne, c. 16, s. 10.

the lessee shall not be liable to pay such rent over again to the transferee:

Where only a part of the property leased is transferred by the lessor, he may (subject to the provisions of section thirty-eight) determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred.

Bill III, s. 69.

108. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Exclusion of day on which term commences.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Duration of lease for a year.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Option to determine lease.

Bill III, s. 70: 7 W. R. 283.

109. A lease of immoveable property determines—

Determination of lease.

3 Moo. I. A. 261; 16 W. R. 147.

(*a*) by efflux of the time limited thereby:

(*b*) where such time is limited conditionally on the happening of some event—by the happening of such event:

Lease by Hindu widow, Marshall 166.

(*c*) where the interest of the lessor in the property leased terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

3 O'Kin. 159. But see per Peacock, C. J. 10. W. R. 15.

(*d*) in case the interests of the lessee and the lessor in the whole of the property leased become vested at the same time in one person in the same right:

Surrender of right to redeem mortgaged lease, N.-W. P. 1869, p. 45; by one of several joint lessees, 9 W. R. 147.

(*e*) by express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them:

(*f*) by implied surrender;

Marshall 250: 16 W. R. 103: 25 W. R. 227. 18 W. R. 465. But see 22 W. R. 448: 25 W. R. 147.

(*g*) by forfeiture that, is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up at title in a third person or by claiming title in himself, and in either case the lessor or his transferee does some act shewing his intention to determine the lease:

23 W. R. 238, 271.

(*h*) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f).

A, the lessee, accepts from the lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

110. A forfeiture under section one hundred and nine, clause (*g*), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor shewing an intention to treat the lease as subsisting: Bill III, s. 71. W. R. F. B. 10: Marshall 25.

Waiver of forfeiture.

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver. 2 Bom. 73.

111. A notice given under section one hundred and nine, clause (*h*), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it shewing an intention to treat the lease as subsisting. Bill III, s. 72.

Waiver of notice to quit.

Illustrations.

(*a*) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(*b*) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

112. Where a lease of immoveable property has determined by forfeiture for non-payment of rent and the lessor sues to eject the lessee if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.' Bill III, s. 73, N.-W.P. 1867, Ex. o. c. j. 1. *Timmarsa Puranik* v. *Baiya Kuppagonda*, 2 Bom. 70. 8 W. R. 225, per Peacock, C. J. Act XVIII of 1873, s. 34, cl. (*c*), para. 1.

Relief against forfeiture for non-payment of rent.

113. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to, and enforceable by, the lessor. Bill III, s. 74: 10 W. R. 384: 13 W. R. 281: N.-W.P. 1871, p. 63.

Effect of surrender and forfeiture on under-leases.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees.

Bill III, s. 75: Report, s. 41: 3 Bom. A. C. J. 27: 12 Beng. 263: N.-W. P. 1870: p. 204. 7 W. R. 152: 16 W. R. 185: 22 W. R. 394, 548: 23 W. R. 271: 25 W. R. 234.

Effect of holding over.

114. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year or from month to month, according to the purpose for which the property is leased, as specified in section one-hundred and six.

Illustrations.

(*a.*) A lets a house to B for five years. B under-lets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(*b.*) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

Exemption of leases for agricultural purposes.

115. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government may by notification in the official Gazette declare all or any of such provisions to be so applicable, together with, or subject to those of the local law (if any) for the time being in force.

CHAPTER VI.

Of Exchanges.

Bill III, s. 76: N. Y. Code, ss. 903, 906: 1 Mad. 100.

"Exchange" defined.

116. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Bill III, s. 77, Code Civil, Art. 1705.

Right of party evicted from thing received in exchange.

117. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange by reason of any defect in the title of the other party is entitled at his option to compensation or to the return of the thing transferred by him

Bill III, s. 78.

Rights and liabilities of parties.

118. Save as otherwise provided in this chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Bill III, s, 79: 1 Morl. 105.

Exchange of money.

119. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

CHAPTER VII.

Of Gifts.

"Gift" defined.

120. "Gift" is the transfer of certain existing moveable or immoveable property made volun-

tarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf the donee.

Acceptance when to be made.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void. L. C. 1531.

Transfer how effected.

121. For the purpose of making a gift of immoveable property, the transfer must be effected by registered assurance signed by or on behalf of the donor, and attested by at least two witnesses. Act III of 1877, s. 17, cl. (a).

Such assurance shall not be considered as insufficiently attested by reason of any benefit thereby given to any person attesting it, or to his or her wife or husband; but the gift shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them. Act X of 1865, s. 54.

For the purpose of making a gift of moveable property, the transfer may be effected either by a non-testamentary instrument registered and signed as aforesaid or by delivery.

Such delievery may be made in the same way as goods sold may be delivered. Act IX of 1872, s. 90.

Gifts of existing and future property.

122. A gift comprising both existing and future property is void as to the latter.

Gift to several, of whom one does not accept.

123. A gift of a divisible thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted. Burge II, 144.

When gift may be suspended or revoked.

124. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Canadian Code, s. 811.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a). A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B. dies without descendants in A's lifetime. A may take back the field.

(b). A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

Donor not bound to warranty.

125. If the donee or any person claiming under him is, by reason of the invalidity of the donor's title, deprived of the thing

given, the donor is not responsible for loss caused thereby.

Act X of 1865, s. 66.

126. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Onerous gifts.

Act X of 1865, s. 100.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if after becoming competent to contract he retains the property given, he becomes so bound.

Onerous gift to disqualified person.

Illustrations.

(*a*) A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(*b*). A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

127. Subject to the provisions of section one hundred and twenty-six, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein:

Universal donee.

128. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law.

Saving of donations *mortis causa* and Muhammadan law.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

129. A claim is actionable when the Civil Courts recognise it as a ground for relief, whether a suit for its enforcement is or is not actually pending or likely to become necessary.

Actionable claims.

Bill III, s. 80: Report, s. 99: 36 & 37 Vic. c. 66, s. 25, (*b*): I Mad. 150, See 5 W. R. 230. But see 10 N.-W. P. 474 cited Macph. 122

130. No transfer of any debt, or any beneficial interest in moveable property, shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to such transfer; and every dealing by such debtor or person, not being a party to, and not having received express notice of, a

Transfer of debts.

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transfer, with the debt or property shall be valid as against such transfer

Illustrations.

(a) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, having no notice of the transfer, pays B. The payment is valid, and C cannot sue A for the debt.

(b) A has jewels deposited with B, a jeweller. A mortgages them to C. A then executes an instrument transferring them to D, who takes it to B and gets the jewels from him before he, B, has received any notice of C's mortgage. B is justified in handing the jewels to D, and C has no remedy against D.

Bill III, s. 81, Report, s. 100.

Notice to be in writing signed.

131. Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

Bill III, s. 82, Fisher, 116: *Sichel* v. *Raphael* 10 Jur. N. S. 1165.

Debtor to give effect to transfer.

132. On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer, unless where the debtor resides, or the property is situate in a foreign country and the title of the person in whose favour the transfer is made is not complete according to the law of such country.

Warranty of solvency of debtor.

133. Where the transfer of a debt warrants the solvency of the debtor the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount of such consideration.

Discharge of person against whom claim is sold.

134. Where an actionable claim is sold, he against whom it is claimed is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Nothing in the former part of this section applies—

(*a*) where the sale is made to the co-heir or co-proprietor of the claim sold;

(*b*) where it is made to a creditor in payment of what is due to him;

(*c*) where it is made to the possessor of a property subject to the actionable claim;

(*d*) where the judgment of a competent court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

Incapacity of officers connected with courts of justice.

135. No judge, pleader, clerk, bailiff or other officer connected with courts of justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.

Bill III, s. 83: *Mangles* v. *Dixon*, 3 H. L. Ca. 702; Fisher, s. 1058.

136. The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

Liability of transferee of debt.

Illustrations.

A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.

Bill III, s. 84: Dav. Conv. II, 691, 693.

137. Where a debt is transferred for the purpose of securing an existing or future debt, the original debt, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery, secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor.

Mortgaged debt.

Bill III, s. 85.

138. Save as provided by section one hundred and thirty-seven, nothing in this chapter applies to negotiable instruments.

Saving of negotiable instruments.

THE SCHEDULE.

(*a*). STATUTE.

Year and chapter.	Subject.	Extent of repeal.
27 Hen. VIII, c. 10. ...	Uses	The whole.
4 Wm. & Mary, c. 16 ...	Clandestine Mortgages...	The whole.

(*b*). ACTS OF THE GOVENOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
XXIX of 1842	Lease and release ...	The whole.
XXXI of 1854	Modes of conveying land	Section 17.
XI of 1855 ...	Mesne profits and improvements.	Section 1, and in the title and preamble, the words "to mense profits and" and "to limit the liability for mesne profits and."
XXVII of 1866...	Indian Trustee Act ...	Section 31.

(*b*). ACTS OF THE GOVERNOR GENERAL IN COUNCIL —(*continued*).

Number and year.	Subject.	Extent of repeal.
IV of 1872 ...	Punjab Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ...	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876 ...	Oudh Laws Act ...	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 ...	Specific Relief ...	In sections 35 and 36, the words "in writing."

(*c*). REGULATIONS.

Number and year.	Subject.	Extent of repeal.
Bengal Regulation I of 1798	Conditional sales ...	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption ...	The whole Regulation.
Bombay Regulation V of 1827.	Mortgagees in possession	Section 15.

B

THE MASTER AND SERVANT BILL, 1879.

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SCHEDULES.

A

BILL

TO

Define and amend the law relating to Master and Servant.

[AS REVISED BY THE INDIAN LAW COMMISSION, 1879.]

WHEREAS it is expedient to define and amend the law relating to master and servant and master and apprentice; It is hereby enacted as follows:—

Preamble.

CHAPTER I.—PRELIMINARY.

Bill, s. 1.

Short title.

1. This Act may be called "The Master and Servant Act, 1880":

Local extent.

It extends to the whole of British India;

Commencement.

and it shall come into force on the first day of March, 1880.

Exemption of Government servants and seamen,

But nothing herein contained applies to servants of Government, as such, or to seamen as defined in Act No. I of 1859 (*for the amendment of the law relating to Merchant Seamen*);

and clerks and domestic servants of Natives.

and nothing contained in sections three to twenty-five (both inclusive) applies to the Hindu, Jain, Sikh, Muhammadan and Buddhist clerks, and to the domestic and agricultural servants of Hindus, Jains, Sikhs, Muhammadans and Buddhists.

Bill, s. 2.

Enactments repealed.

2. The Acts mentioned in the first schedule hereto annexed shall be repealed. But all references in any enactment to any of such Acts shall be deemed to be made to the corresponding part of this Act, and all powers conferred under the second or third of such Acts shall be deemed to have been conferred hereunder.

CHAPTER II.—OF THE CONTRACT OF SERVICE.

Bill, s. 3.

Interpretation-clause "Contract of service":

3. A contract binding one party to employ and remunerate, and the other to do personally any work in such manner as the former party directs, and otherwise than in pursuit of an independant calling is called a "contract of service": the remuneration contracted for is called the "wages": the party contracting, by himself or his agent, to employ and remunerate is called the "master": and the party contracting to do the work is called the "servant."

"Wages":

"Master":

"Servant."

Dhanno Sirang v. *Upendra Mhan.*

"Domestic servant."

A "domestic servant" is a servent who contracts to do household or menial work, and includes also groom, coachman, elephant driver, porter, cowherd,

grass-cutter, gardener, poultry-man, dog-boy, household tailor, washerman, messenger, watchman, boatman, tent-pitcher, sweeper and water-carrier. *Tagore*, 8 Beng. 244.

"Fellow-servants" are servants of one person jointly engaged on his behalf in an employment with a common object. "Fellow-servants." *Swainson* v. *N. E. Railway Co.*, 3. Exch. Div. 344.

Persons competent to enter into contracts of service.

4. Every person competent to contract may enter into a contract of service. Bill, s. 4.

Explanation.—For the purposes of this section a minor is competent to contract; but the contract cannot be enforced against him unless it is beneficial to him. This modifies Act IX of 1872, s. 11, 3 Q. B. Div. 229.

5. In the absence of express provision as to the amount of wages, the servant is presumed to contract for the wages ordinarily paid, at the place and time of entering into the contract, by masters of the same class as the master to servants of the same class as the servant. Bill, s. 5.

Presumption as to wages.

Presumption as to term of service.

6. In the absence of a contract or local usage to the contrary,—

(*a*) tutors, governesses, and managers of tea-gardens, coffee-plantations, indigo-concerns, banks, mines, breweries, cotton-mills, jute-mills, paper-mills, rice-mills, saw-mills, sugar-works and pressing-companies are presumed to be hired for a year, and the contract is terminable, on the part of either master or servant, by ninety days' notice of his intention to put an end to the service, or by payment or tender of three months' wages in advance;

(*b*) domestic servants are presumed to be hired for a month, and the contract is terminable, on the part of either master or servant, by fifteen days' notice of his intention to put an end to the service, or by payment or tender of fifteen days' wages in advance; As to the fortnight's notice, see Bengal Regulation VII of 1819, s. 6, repealed by Act XVII of 1862.

(*c*) agricultural servants are presumed to be hired for the season, and the contract is terminable on the part of either master or servant, by thirty days' notice of his intention to put an end to the service, or by payment or tender of a month's wages in advance, except in the case of labourers hired under Bengal Act VII of 1873, in which case the contract is terminable, on the part of either master or servant, by ninety days' notice of his intention to put an end to the service, or by payment or tender of three months' wages in advance;

(*d*) artisans and workmen are presumed to be hired for no specific term, and the contract is terminable, at the will of either party, by notice to the other that the service is at an end;

(*e*) persons hired by piecework are presumed to be hired till the job is ended: the contract is not terminable by notice; but either party may terminate it by payment or tender of the wages agreed to be paid for the job;

(*f*) clerks and all other servants not hereinbefore provided for are presumed to be hired for

a month, and the contract is terminable, on the part of either master or servant, by thirty days' notice of his intention to put an end to the service, or by payment or tender of a month's wages in advance.

Chapman's case, L. R. 1 Eq. 346, followed in the case of the *Calcutta Steam-tug Association*, Ind. Jur. 17.

If the master is a public company, the order for winding it up, or where the winding-up is voluntary, the passing of the resolution authorizing the same, shall be deemed to be a notice duly given to the servant under this section, unless where express notice to put an end to the service has been duly given to the servant and is still in force.

Bill, s. 7.

Withdrawal of notice.

7. Any notice of intention to put an end to service may, with the consent of the party receiving it, be withdrawn by the party giving it, and thereupon the service shall continue as if no such notice had been given.

Bill, s. 8.

Termination of contract.

8. A contract of service is terminated—

(*a*) by the death of the master, unless where the contract provides otherwise:

(*b*) by the death of the servant:

(*c*) by mutual consent of the parties:

(*d*) on expiration of the term of service:

(*e*) on expiration of a notice to put an end to the service duly given to the master or the servant:

(*f*) by payment or tender of wages under section six:

(*g*) when the master rightfully discharges the servant:

(*h*) when the servant rightfully quits his master's service.

The provisions of this section as to the death of a master apply, where the master is a private partnership, to its dissolution.

Bill, s. 9.

Presumption of renewal of contract.

9. Where, after the termination of a contract of service, the parties continue the relation of master and servant, they are presumed, till the contrary is proved, to have renewed the contract, except as regards the term of service (if any) expressed therein.

CHAPTER III.—Of the Rights of the Master and the Duties of the Servant.

Bill, s. 10.

Master's right to compensation when servant refuses to enter service.

10. When a servant refuses or fails to enter his master's service, the master is entitled to compensation for the injury caused by the refusal or failure, unless the servant is prevented by some cause over which he has no control from performing his contract.

Bill, s. 11.

Obligations of servant after entry.

11. When a servant has entered his master's service, he is under the following obligations:—

(*a*) he must obey all reasonable orders relating to his employment given by his master or by any person to whom the master has expressly or impliedly delegated power to give such orders:

(*b*) he must abstain from intoxication during any part of his time belonging to his master :

(*c*) he must be respectful to his master and his master's family, guests, lodgers, visitors and customers :

(*d*) he must be diligent in his master's business :

(*e*) he must run all risks incident to the service :

(*f*) he must take the same care of his master's property entrusted to him as a man of ordinary prudence would, under similar circumstances, take of his own property of the same kind and value ; ond he must make good any loss which he causes to his master by want of ordinary care or reasonable skill : IX of 1872, s. 151.

(*g*) he must indemnify his master from liability to make compensation for injury caused by any wrongful act or default of the servant :

(*h*) he must use his best endeavours to protect his master against the wrongful acts and defaults of his fellow-servants, (if any) :

(*i*) he must, as often as he may be reasonably required, account for money or goods received from or on account of his master, or belonging to his master and coming to the servant's hands ; and must, without demand, deliver to his master, as soon as, with reasonable diligence, he can find him, everything that he receives on his master's account :

(*j*) he must not set up his own title or the title of any third person to money or goods so received or coming to his hands, in opposition to his master's title thereto, except where the master's title accrued fraudulently or wrongfully, or under avoidable contract which has become void :

(*k*) he must continue in the service during the whole time that he has contracted for, unless the contract has been terminated under section eight ; and in the case of a domestic servant,—

(*l*) when he is temporarily disabled by illness from performing his duties, he must provide at his own expense a substitute satisfactory to the master, or, if the master employs and pays a substitute, allow the master to deduct such payment from his wages ; and

(*m*) when the master dies leaving a widow or minor children, and the widow or guardian of the children requires the servant to renew his contract for the same wages for a term not exceeding one month from the date of the death, the servant must comply with such request and the widow or guardian (as the case may be) must pay the wages accruing due to the servant during such term.

Nothing in clause (*l*) applies where the servant's illness arises from hurt received in the course of his employment.

12. In the absence of an express agreement to the contrary, all the time of domestic servants, not reasonably required for bathing, meals, sleep and religious duties, belongs to the master : the time of other servants belongs to the master to such Bill s. 12.

Time of servant.

extent as is usual in the business in which they serve.

Bill, s. 18.

13. A master may, without notice or payment or tender of wages, discharge his servant, whether hired for a fixed term or not, for any of the following causes:—

Master's power to discharge.

(*a*) wilful breach of the obligation imposed by section eleven, clause (*a*):

(*b*) failure to perform either of the obligations imposed upon the servant by section eleven, clauses (*b*) and (*c*):

(*c*) conduct likely to injure his master's business materially:

Smith 117: *Spondet peritiam artis*, see I. L. R. 2 Calc. 33.

(*d*) claiming to be a partner with his master:

(*e*) want of reasonable skill to discharge the duties for which the servant was hired or gross negligence in their performance:

(*f*) illness disabling him from performing his duties for a continuous period of thirty days:

(*g*) imprisonment in a civil or criminal jail:

(*h*) wilful absence from his master's service without leave:

(*i*) misconduct, before or after the commencement of his service, implying a defect of character which unfits him for such service.

Willets v. *Green*, 3. Car. & K. 59. Injunction not granted to prevent breach by master, Act I of 1877, section 66, clause (*f*): Smith 124.

The existence of any such cause, though not known to the master at the time of the discharge, is sufficient to justify a discharge under this section.

CHAPTER IV.

Of the Rights of the Servant and the Duties of the Master.

Bill, s. 16.

14. Where a master refuses to receive his servant into his service, the servant is entitled to compensation for the injury caused by such refusal, unless at the date of the refusal a cause exists which, if he had entered the service, would have justified his discharge.

Servant's right to compensation from master refusing to receive into service.

When the service is to begin on a future day, a suit for such compensation may be brought, at the option of the plaintiff, either immediately on the refusal or on or after such future day.

Illustration.

Hochster v. *De La Tour*, E. & B. 7 8, 691. As to measure of damages, see Explanation to section 73 of Act IX of 1872.

A, in September, engages a servant, B, at Rs. 30 per mensem to accompany him on tour for three months through India, to commence on the first of November. In October, A writes to B saying that he has changed his mind and no longer requires B's services. B thereupon institutes a suit against A for compensation. Afterwards, before the first of November, B obtains another engagement at Rs. 30 per mensem to commence on the first December. There exists no cause which, if B had entered the service, would have justified his discharge. B is entitled to a decree for compensation against A.

Bill, s. 17.

15. Where a servant has entered his master's service, the master is under the following obligations:—

Obligations of master—

(*a*) he must retain the servant during the whole time that he has contracted to do so, unless the contract has been terminated under section eight:

as to retaining servant;

(*b*) he must pay the wages which he has contracted to pay: provided that, where such wages are payable periodically, and the servant is rightfully discharged, or wrongfully quits the service, the servant is not entitled to any wages for his services since the last day on which a payment became due to him under the contract:

as to payment of wages;

Aamji Manor v. Little, 10 Bom. 57.

(*c*) he must indemnify the servant from liability for doing any act pursuant to an order of his master which he was bound to obey, or any unlawful act, which the servant, not having reason to believe it to be unlawful, was induced by the conduct of his master to believe to be lawful:

as to indemnifying servant;

N.Y.Code, §1005.

Smith 189.

(*d*) he must not inflict any punishment on the servant, by way of imprisonment, corporal chastisement, forfeiture of wages or otherwise, whether the servant is or is not a minor.

as to punishment;

Nothing contained in this clause renders void any agreement under which the master may, in the events therein specified, withhold the whole or any part of the servant's wages:

Campbell v. *E. I. Co.*, Bourke 56.

(*e*) where the master personally works along with the servant, he must make compensation to the servant for injury caused to such servant by the master's want of ordinary care or reasonable skill:

as to compensating servant for injury caused by master's neglect;

(*f*) where the servant is employed in a work of danger, the master must (1) use reasonable endeavours to provide proper materials and apparatus for the work, and (2) take all other reasonable precautions so as to protect the servant against unnecessary risk: and where the servant is employed in such work along with fellow-servants, (3) use reasonable endeavours to provide fellow-servants of ordinary care and reasonable skill:

as to servants employed in dangerous work:

Smith 212, 213: L. R. 1. Sec. & Ir. App. 333, 2: App. Ca. 87.

Smith 209, 214.

(*g*) where the servant is a domestic servant of European birth or parentage, the master must provide him with food of proper description and in sufficient quantity, and, in case of sickness or hurt, with the necessary medical or surgical attendance and medicine.

as to European domestic servants,

Illustrations.

(*a*) A, a servant, in obedience to the command of his master, B, commits a trespass on the property of C, not having reason to believe that he is doing any injury. C sues A for damages and recovers Rs. 50. A is entitled to recover the Rs 50 from B.

Rule that one wrong-doer cannot sue another for contribution does not apply.

(*b*) A hires B, a brickmaker, to make bricks with C's trademark thereon. B, having no reason to believe that the trademark was C's, proceeds to make the bricks accordingly; C sues B to restrain him from using the trademark

and obtains an injunction with costs which B pays. B may recover the amount so paid from A.

Drylls v. *Davis*, 2 B & Ad. 516.

(*c*) A orders his servant B to sell an unsound mare, but not to warrant her soundness. B sells the mare to C with a warranty of soundness. C sues and recovers damages from B for breach of the warranty. B cannot recover these damages from A.

Ashworth v. *Stanwix.*

(*d*) A and B are lessees of a coal pit. B acts as banksman at the mouth of the pit, and whilst so acting is guilty of negligence whereby C, a pitman in the service of A and B, is injured. Both A and B are liable for the injury.

Bill, s. 18. Cf. Act IX of 1872, s. 225.

Servant's right to compensation for breach of duty imposed by section 15, clauses (*e*) and (*f*).

16. When a servant has sustained particular injury by a breach of any of the obligations imposed on his master by section fifteen, clauses (*e*) and (*f*,) the servant is entitled to compensation for such injury: provided that he could not have avoided the injury by the exercise of ordinary care, and at the time of the injury he had no reason to believe that the breach had been committed.

If by ordinary care he might have avoided injury, he is the author of his own wrong.

Illustrations.

(*a*) A hires B and C to row, and D to steer, his boat. A has done nothing to ascertain D's competence to act as steerman. Owing to D's want of reasonable skill, the boat collides with a ship in full sail and B and C are injured. B and C may sue A for compensation.

(*b*) A railway company hires A to drive a locomotive, B to be guard of a train, and C to regulate the switches. The company has neglected to ascertain that C was ordinarily careful, and owing to his carelessness the train runs off the line and A is killed and B is maimed. A's legal representative and B may sue the company for compensation.

Potts v. *Plunkett*, Smith 214.

(*c*) A employs B to work as his servant in a mine. Owing to A's negligence the roof of the mine is left unsafe. B, having no reason to believe in the existence of the danger, begins to work in the mine and a stone falls from the roof and breaks B's leg. B may sue A for compensation.

(*d*) A orders his servant, B, to carry a bag of rice up a ladder, which A knows, but B has no reason to believe, to be unsafe. B obeys the order. The ladder breaks and B falls and fractures his thigh. B may sue A for compensation.

Bill, s. 19.

Compensation for wrongful discharge.

17. When a servant is wrongfully discharged, he is entitled to compensation for the injury caused by the discharge in not being allowed to serve and earn the wages contracted for.

Measure of compensation.

The amount of such compensation is subject to the following rules in cases to which they are applicable:—

Sedgwick 163. Act IX of 1872, s. 73.

(*a*) Where the contract is to employ for a specified term, the amount shall be the difference between the wages which the servant would have received under his contract with his master and the wages which he has, or might have, received under another contract of service:

(*b*) Where no term is specified, but the contract is terminable by fifteen days' notice, the amount shall be fifteen days' wages:

(*c*) Where no term is specified, but the contract is terminable by thirty days' notice, the amount shall be a month's wages:

(*d*) Where no term is specified, but the contract is terminable by ninety days' notice, the amount shall be three months' wages.

When a servant is wrongfully discharged at a place other than the place at which he entered the service, he is also entitled to the reasonable expenses of his journey back to the latter place.

Bill, s. 20.

18. A servant, whether hired for a fixed term or not, may, without notice or payment or tender of the amount of wages, terminate the contract of service—

Termination of service by servant.

(*a*) if the master wilfully or permanently breaks any of his obligations to the servant;

Acts causing trifling harm are not so punishable, Act XLV of 1860, s. 95.

(*b*) if the master commits against the servant any offence punishable under the Indian Penal Code, Chapter XVI (*Of offences against the human body*) or XVII (*Of offences against property*);

1 Q. B. Div. 546.

(*c*) if the servant is prevented by permanent illness or other cause over which he has no control from fulfilling his contract.

Illustrations.

(*a*) A contracts to serve B for a year for the monthly sum of Rs. 100. B refuses to pay the amount due to A for the first month. A may thereupon terminate the contract.

(*b*) A contracts to serve B. B voluntarily causes hurt to A. A may thereupon terminate the contract.

Bill, s. 21. N. Y. Code, § 1033. Wages when contract terminated by notice to quit given by servant, N.-W.P. Rep., 1867, Misc. Rulings 1.

19. When the servant is wrongfully discharged, or when the contract of service is terminated otherwise than by his rightful discharge, the servant or his legal representative, as the case may be, is entitled, in addition to the compensation and expenses (if any) recoverable by him under this Act or any other law, to the wages (if any) due for the period during which the servant has actually served the master.

Wages in case of wrongful discharge or termination of contract for master's fault or by death.

For the purpose of this section all wages shall (in the absence of an express agreement to the contrary) be deemed to accrue due from day to day.

CHAPTER V.—Of Apprentices.

Act XIX of 1850, s. 7.

20. Any child above the age of ten and under the age of eighteen years may be bound by the persons or officers hereinafter mentioned in this behalf apprentice in any fit trade, craft or employment for any specified term not exceeding seven years, so that it be not prolonged beyond the term of majority, or, in the case of females, marriage.

Apprenticing child between ten and eighteen years old.

The persons and officers above referred to are as follows:—

(*a*) the father of the apprentice; or

(*b*) if the father is dead, the guardian of the person of the apprentice; or

(*c*) if there is no such father or guardian, or if the father is incompetent to contract or has abandoned his child, any Magistrate; or

(*d*) in the case of a child convicted of any cognizable offence, the convicting Magistrate; or

(*e*) in the case of a child brought up by any public charity, the governors, directors or managers thereof.

Apprenticing in sea service.

21. Where a boy is bound under the last preceding section apprentice in the sea service, the following conditions must be observed:—

(*a*) the person to whom he is bound must be a British subject and the owner of a registered ship belonging to and trading from some port in British India which has been declared to be a registering port under Act No. X of 1841;

(*b*) the ship in which he is to be employed must be such a ship, belonging to such a person, and commanded by a British subject, who must, when the apprentice is of European birth or parentage, be also of European birth or parentage.

The master of any ship in which an apprentice is employed shall, for the purposes of this chapter, be deemed the agent of the person to whom the apprentice is bound.

Act XIX of 1850, s. 8.

Form and contents of contract.

22. Every contract of apprenticeship shall be according to the form in the second schedule hereto annexed or to the like effect, and in writing, and shall set forth particularly—

(*a*) the age of the apprentice:

(*b*) the term for which he is bound;

(*c*) what he is to be taught;

(*d*) the pecuniary consideration (if any) on either part.

Act XIX of 1850, s. 9.

Signatures to contract.

23. Every such contract shall be signed as follows:—

(*a*) by the person to whom the apprentice is bound:

(*b*) by the person by whom he is bound, or when he is bound by the governors, directors or managers of a public charity, any two of them or their secretary or other officer appointed in this behalf; and

(*c*) by the apprentice, if he is of the age of fourteen years or more at the date of the contract.

Act XIX of 1850, s. 10.

Contract not valid unless executed as prescribed and deposited.

24. No such contract shall be valid unless it is executed in manner aforesaid nor until it has been deposited—

(*a*) if it has been executed in any of the towns of Calcutta, Madras or Bombay and the apprentic is not bound to the sea service,—in the Court of a Presidency Magistrate;

(*b*) if it has been executed elsewhere in British India and the apprentice is not bound to the sea service,—in the Court of the District Magistrate;

(*c*) if the apprentice is bound to the sea service,—in the office of the person appointed under the said Act No. X of 1841 to make registry of ships at the port where the apprentice is to begin his service.

Certified copies.

The Magistrate or officer in whose court or office any such contract is deposited shall give to each

of the parties a copy thereof certified in manner provided by the Indian Evidence Act, 1872, section 76.

Evidence of age.

The age set forth in any such contract shall be evidence of the age of the apprentice in all questions arising as to the right of the master to the continuance of the service. Act XIX of 1850, s. 2.

Alteration of terms of service.

25. At any time during the apprenticeship the terms of service may be changed or the contract may be determined: provided that such change or determination— Act XIX of 1850, s. 11.

(*a*) be with the consent of both parties to the contract or their legal representatives and of the apprentice if he is above the age of fourteen years; and—

(*b*) be expressed in writing on the original contract with the signature of the proper parties, according to section twenty-three.

The Magistrate or registering officer shall thereupon make under his hand corresponding endorsements on the copies of the contract deposited in his Court or office.

Assignment of apprentice to new master.

26. The master of any apprentice may, with the consent of the person by whom he was bound or the legal representative of such person, and with the consent of the apprentice, if he is above the age of fourteen years, assign such apprentice to any other person who is willing to take him for the residue of his apprenticeship and subject to the conditions thereof: Act XIX of 1850, s. 12.

Provided that such assignee shall, by endorsement under his own hand on the contract, declare his acceptance of such apprentice, and acknowledge himself bound by the agreements therein mentioned to be performed on the part of the master: and that the consent of the other parties aforesaid be expressed in writing on the same and signed by them respectively.

Every such assignment shall be certified under the hand of the Magistrate or registering officer on the copy of the contract deposited in his Court or office according to the form given in the second schedule hereto annexed.

Effect of master's death during apprenticeship.

27. If the master of any apprentice dies before the end of the apprenticeship, the following results shall ensue:—

(*a*) the contract of apprenticeship shall be thereby determined, and a proportionate part, corresponding to the unexpired portion of the term, of any premium which has been paid to such master on the binding of the apprentice to him, shall be returned out of the estate of the deceased by his legal representative to the person who has paid the same, unless such legal representative continues the business in which such apprentice has been employed, and within three months of the death of the late master offers in writing to keep the apprentice on the terms of the original contract; in which case the estate of Act XIX of 1850, s. 19.

the deceased shall be discharged from all liability in respect of such premium:

XIX of 1850, s. 20.

(*b*) every such offer shall be fully expressed and certified by the legal representative on the original contract of apprenticeship, and also by the Magistrate or registering officer on the copy thereof so deposited; and the apprentice shall be bound to the legal representative so keeping him for the remainder of the term of his apprenticeship.

(*c*) the apprentice shall be entitled to be maintained for three months from the master's death out of the assets left by him; provided that during such three months the apprentice continues to live with and serve as an apprentice the master's legal representative, or such person as he appoints.

XIX of 1850, s. 22.

28. If the master of any apprentice is during the apprenticeship adjudged to have committed an act of insolvency or declared an insolvent, the apprentice shall be discharged from all obligation under the contract of apprenticeship; and if any premium was paid on binding him apprentice, he or the person by whom he was bound shall be entitled to claim the amount thereof as a debt against the estate of the insolvent.

Effect of master's insolvency.

Penn v. *Ward*, 2 C. M. & R. 338.

29. The rights and duties of the master as regards the apprentice, and the rights and duties of the apprentice as regards the master, are (subject to the provisions of the contract of apprenticeship) as nearly as may be the same as those set forth in sections eleven, twelve, fifteen and eighteen: provided that if an apprentice is guilty of misbehaviour, his master may chastise him in a moderate manner.

Rights and duties of master and apprentice.

Master's powers to chastise.

CHAPTER VI.—Jurisdiction of Magistrates.

(*A*).—*Artisans, Workmen and Labourers.*

Bill, s. 26. Act XIII of 1859, which now applies to the Presidency-towns, the Bombay and Madras Mufassal, Massuri, Landour, Saharanpur, Mirath, Muradabad, Bareli, Naini Tal, Shahjahanpur, Agra, Farakhabad, Cawnpore, Allahabad, Benares, Mysore, Coorg, Sindh, the Panjab and the districts of Nimar, Sylhet and Goalpara, and probably elsewhere. Cold

30. When an employer advances to an artisan, workman or labourer money on account of, or to be used as material for, any specific piece of work which the latter has contracted to execute wholly or partly by himself, and such artisan, workman or labourer wilfully and without sufficient excuse neglects or refuses to perform his contract, the employer may complain to a Magistrate, who shall thereupon issue a summons or warrant, as he thinks fit, for bringing such artisan, workman or labourer before him.

Failure to perform work on account of which artisan has received an advance.

If the Magistrate, after hearing such evidence as the parties may adduce, is satisfied of the truth of the complaint, he shall, at the option of the employer, either—

(*a*) order the artisan, workman or labourer, on or before such day as the Magistrate directs, to repay the money advanced or such part thereof as the Magistrate thinks fit, together with any materials delivered by the employer to the artisan,

workman or labourer for the purpose of the contract, or

(*b*) order him to execute the work according to the terms of the contract.

and silver money given to a goldsmith as raw material wherewith to make an idol has been held an advance within the meaning of Act XIII of 1859, s. 2, 6 Mad. H. C. Rulings, xxiv.

If the artisan, workman or labourer fails to comply with either of such orders, the Magistrate may sentence him to imprisonment for a term which may extend to three months, or, when the order is for repayment of money, for such term or until such money is sooner repaid.

Where the Magistrate makes an order under clause (*b*), he may also, at the employer's request, require the artisan, workman or labourer to execute a bond, with sufficient sureties, for the due performance of the order; and, in default of his executing such bond, or furnishing such sureties to the satisfaction of the Magistrate, may sentence him to imprisonment for a term which may extend to three months.

Where the bond is executed, but the order under clause (*b*) is not duly performed, payment of the penalty of the bond may be enforced in manner provided by the Code of Criminal Procedure, section 396, or (in the towns of Calcutta, Madras and Bombay) by the Presidency Magistrates Act, 1877, section 77.

Nothing in this section applies to cases where the advance has been, in accordance with the contract, worked off or expended.

(*B*).—*Workmen employed on Public Works.*

Bill, s. 27. Act IX of 1860, which now applies to the Panjab, nine Bombay Districts, Nimar, Nadiya, 24-Parganas and Baraset, part of the Central Provinces and probably elsewhere.

Disputes between employers and workmen on railways, etc.

31. Any Magistrate may enquire into and decide disputes as to wages, hire of carriage and price of work between any employers and their workmen employed in the construction of any railway, canal or other public work sanctioned by Government: Provided that the amount in dispute does not exceed two hundred rupees.

Cases under this section shall be dealt with, so far as may be, as if they were trials under the Code of Criminal Procedure, chapter XVI. But no appeal shall lie from the decision in any such case.

When the Magistrate has heard and decided the case, he shall make an order for the payment immediately or within such time as he directs, of such sum of money (if any) as appears to him to be justly due, and, if the person ordered to pay fails to pay such sum immediately or within such time as the Magistrate directs, the Magistrate shall issue his warrant to levy the money by distress and sale of the moveable property of the defaulter.

Bill, s. 28.

Punishment for breach of contract to work for fixed term on railway, etc.

32. Whoever contracts to work for a specified term on any such railway, canal or other public work, or to execute any specific work in connection therewith, and who wilfully and without sufficient excuse neglects or refuses to perform such contract, shall be liable, on conviction before a Magistrate, to a fine not exceeding twenty rupees.

But the Magistrate may, at the request of the employer, instead of punishing the servant so neglecting or refusing, order him by himself or another to execute the work according to the terms of his contract; and if he fail to comply with such order, the Magistrate may sentence him to imprisonment for a term which may extend to two months.

Power to order performance of contract.

(*C*).—*Apprentices.*

Act XIX of 1850, s. 13.

33. Upon complaint made to any Magistrate by or on behalf of any apprentice of refusal or neglect to provide for him, or to teach him according to the contract of apprenticeship, or of cruelty or other ill-treatment by his master, or by the agent under whom he has been placed by his master, the Magistrate may summon the master or his agent, as the case may be, if he is within his jurisdiction, to appear before him at a reasonable time, to be stated in the summons, to answer the complaint; and at such time, whether the master or his agent be present or not (service of the summons being proved), may examine into the matter of the complaint; and, upon proof thereof, may cancel the contract of apprenticeship, and assess upon the offender, whether he be the master or his agent, a reasonable sum for behoof of the apprentice, not exceeding four times the amount of the premium paid upon the binding, or if no premium or a less premium than fifty rupees was paid, not exceeding two hundred rupees; and, if the offender fails to pay the sum so assessed, may levy the same by distress and sale of his moveable property, and if the offender is not the master but his agent, by distress and sale of the moveable property of the master also.

Complaint by apprentice against master.

Act XIX of 1850, s. 17.

34. The Magistrate may order any sum recovered under section thirty-three to be either laid out in binding the apprentice to another master, or otherwise for his benefit, or paid to the person by whom any premium was paid when he was bound apprentice.

Appropriation of sum recovered for apprentice on cancellation of contract.

Act XIX of 1850, s. 14.

35. No contract of apprenticeship shall be cancelled on account of moderate chastisement for misbehaviour given to any apprentice by his master or the agent of his master; and the provision for enabling the contract of apprenticeship to be cancelled shall not bar any criminal proceeding against any master or his agent for an assault or other offence committed against his apprentice for which he would be liable to be punished, whether or not any proceedings be taken for cancelling the contract of apprenticeship.

Contract not to be cancelled for moderate chastisement.

Liability of master for assault.

Act XIX of 1850, s. 15.

36. Upon complaint made to any Magistrate by or on behalf of the master of any apprentice of any ill-behaviour of such appren-

Complaint by master against apprentice.

tice, or if such apprentice has absconded, the Magistrate may issue his warrant for apprehending such apprentice, and may hear and determine the complaint, and punish the offender, by an order for keeping the offender, if a boy, in confinement in any suitable place, not being a criminal gaol, for any time not exceeding one month, of which one week may be in solitary confinement, during which time such allowance shall be made for his subsistence by the master or his agent as the Magistrate may order; and, if the offender be a boy of not more than fourteen years of age, may order him to be privately whipped: or, if the offender be a girl, or in the case of any boy the Magistrate deem any such punishment unfit, he may pass an order empowering the master of the apprentice or his agent to keep the offender in close confinement in his own house, or on board the vessel to which he belongs upon bread and water, or such other plain food as may be given without injury to the health of the apprentice, for a period not exceeding one month.

Cancellation of contract for misconduct of apprentice.

37. Upon complaint of wilful and repeated ill-behaviour on part of the apprentice, and on the demand of the master, the Magistrate may order the contract of apprenticeship to be cancelled, whether or not the charge is proved; but only with the consent of the apprentice and of his father or guardian, if the charge is not proved. Such cancelling shall be with or without refund of the whole or part of any premium paid to the master on binding such apprentice as to the Magistrate seems fit: and all sums so refunded shall be applied under the direction of the Magistrate for behoof of the apprentice. Act XIX of 1850, s. 16.

Limitation of complaints.

38. No Magistrate shall entertain a complaint on the part of a master against an apprentice unless it be brought within one month after the cause of complaint arose; or, if the cause of complaint arose on boardship during a voyage, within one month after the arrival thereof at a port or place in British India; Act XIX of 1850, s. 18.

and no Magistrate shall entertain a complaint on the part of an apprentice against his master or the agent of his master unless it be brought within three months after the cause of complaint arose; or if the cause of complaint arose on boardship during a voyage, within three months after the arrival of the ship at a port or place in British India.

(*D*).—*Miscellaneous.*

"Master," "employer" and "Magistrate."

39. In this chapter "master" and "employer" include also any person authorized to act on behalf of a master or employer; and "Magistrate" means in the towns of Calcutta, Madras and Bombay a Presidency Magistrate, and elsewhere a Magistrate of the first or second class empowered by the Local Government to act under this chapter. Bill, s. 29.

Bill, s. 30.

Saving of prosecutions under other laws.

40. Nothing herein contained shall prevent any person from being prosecuted under any other law for any offence punishable under this chapter: provided that no person shall be punished twice for the same offence;

2 Mad.

Saving of civil remedies.

and no order made under this chapter for the payment of money shall, while the same remains unpaid, deprive the complainant of any civil remedy which he might have had but for this Act.

THE FIRST SCHEDULE.

ENACTMENTS REPEALED.

(*See section 2.*)

Number and year.	Subject.
XIX of 1850 .	For the binding of Apprentices.
XIII of 1859 .	For the punishment of breaches of contract by artificers, workmen and labourers in certain cases.
IX of 1860 . .	For the speedy determination of certain disputes between workmen engaged on railway and other public works and their employers.

THE SECOND SCHEDULE.

FORMS.

(*See sections 22 and 26.*)

A.—Form of Agreement.

This agreement, made the day of in the year between A. B. of and C. D. of , witnesseth that the said A. B. doth this day bind E. F., a boy (*or* girl) of the age of years completed, son (*or* daughter) of the said A. B. (*or otherwise describing the relation in which A. B. and E. F. stand*) to dwell with and serve the said C. D., as an apprentice, from this day forth for years (*in the case of a girl add*, "or until the time of her marriage, which shall first happen"), during all which term the said apprentice shall faithfully serve the said C. D. according to his (*or* her) skill and ability in all lawful business, and demean and behave himself (*or* herself) honestly, orderly and obediently, in all things towards the said C. D. and his (*or* her) family. And the said C. D. for himself (*or* herself) and his (*or* her) executors and administrators, in consideration [of the premium or sum of paid by the said A. B. to the said C. D., and] of the faithful ser-

If there is no premium the words between brackets may be omitted.

vice of the said E. F., doth agree with the said A. B., his (*or* her) executors and administrators, that he (*or* she) will teach or cause to be taught to the said E. F., in the best way and manner that he (*or* she) can, the trade (craft or employment) of a during the said term; and will also, during the said term, provide the said apprentice with good, wholesome and sufficient food, clothes, lodging, washing and all other things necessary, fit and reasonable for an apprentice (and further, *here insert any special agreements*).

In witness whereof, the parties have hereunto set their hands and seals, the day and year above written.

A. B. L. S.

C. D. L. S.

B.—Form of Order of Assignment.

(To be endorsed on the Agreement.)

Be it known to all men that on the day of in the year personally, appeared before G. H., Magistrate of C. D. of with E. F., his (*or* her) apprentice, and J. K. of , and desired that the agreement of apprenticeship whereby the said E. F. was bound to the said C. D. might be assigned to the said J. K., and the said G. H., having satisfied himself, by personal examination of the said E. F. and by other lawful ways and means, that such assignment is for the benefit of the said E. F., and is made with the consent of [the said E. F., and of] all persons whose consent thereunto by law is required, doth allow such assignment; and the contract of apprenticeship whereby the said E. F. was on the day of in the year bound to the said C. D. as an apprentice to learn the trade (craft *or* employment) of a shall henceforth endure, unto the end of the said term, as if the said J. K. had been originally party to the said deed, and had executed the same, in the place of the said C. D., and shall be bound, for himself (*or* herself), his (*or* her) executors or administrators, to fulfil the agreements by the said C. D. to be performed, and the said E. F. shall henceforth be bound unto the said J. K., in like manner as he (*or* she) was by the said agreement bound unto the said C. D.

If E. F. is not above the age of fourteen years, the words between brackets may be omitted.

C. D. *E. F.* *J. K.*

In witness whereof, the said C. D., E. F. and J. K. have hereunto set their hands before me, the day and year above written.

G. H., Magistrate.

C.

THE EASEMENTS BILL, 1879.

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A

BILL

TO

Define and amend the law relating to Easements and Licenses.

[AS REVISED BY THE INDIAN LAW COMMISSION, 1879.]

WHEREAS it is expedient to define and amend the law relating to Easements and Licenses; It is hereby enacted as follows:—

Preamble.

PRELIMINARY.

Bill, s. 1.

Short title.

1. This Act may be called "The Easements Act, 1880."

Local extent.

It extends to the whole of British India except the scheduled districts;

Commencement.

and it shall come into force on the first day of *March, 1880.*

Bill, s. 2.

Savings.

2. Nothing herein contained shall be deemed to affect—

(*a*) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels and of natural lakes and ponds; or of water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

(*b*) any customary or other right (not being a license) in or over immoveable property which the Government, the public or any person may possess irrespective of other immoveable property; or

(*c*) any right acquired, or arising out of a relation created, before this Act comes into force;

(*d*) any law not hereby expressly repealed.

Bill, s. 3.

Repeal of Act XV of 1877, sections 26 and 27.

3. Sections 26 and 27 of the Indian Limitation Act, 1877, and the definition of 'easement' contained in that Act, are hereby repealed.

All references to the said sections, or to sections 27 and 28 of Act No. IX of 1871, shall be read as made to sections fifteen and sixteen of this Act.

CHAPTER I.—OF EASEMENTS GENERALLY.

Bill s. 4.

"Easement" defined.

4. An easement is a right which the owner or occupier of certain land possesses as such for the beneficial enjoyment of that land, to do and continue to do something, or prevent and continue to prevent something being done, in, or upon, or in respect of, certain other land not his own.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner: the land on which the liability is imposed is called the servient heritage, and the owner thereof the servient owner.

Dominant and servient heritages and owners.

Explanation.—In the first and second clauses of this section, the expression 'land' includes also things permanently attached to the earth: the expression 'beneficial enjoyment' includes also possible convenience, remote advantage, and even a mere amenity; and the expression 'to do something' includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.

Illustrations.

(*a*). A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(*b*). A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household out of a spring therein. This is an easement.

(*c*). A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.

(*d*). A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.

(*e*). A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and repassing. This right is not an easement.

(*f*). A is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.

Bill, s. 5

5. Easements are either affirmative or negative. An affirmative easement is one authorizing the dominant owner to do in, upon or in respect of, the servient heritage, something for the beneficial enjoyment of the dominant heritage. A negative easement is one binding the servient owner to refrain, for the beneficial enjoyment of the dominant heritage, from doing something in, upon or in respect of, the servient heritage.

Affirmative easements.

Negative easements.

Illustrations.

The following are affirmative easements:—

(*a*). A right of way annexed to A's house over B's land.

(*b*). An easement annexed to A's land to conduct water across B's land by an artificial watercourse.

(*c*). An easement annexed to A's house to discharge water by a spout or conduit, or projecting eaves, on B's land.

(*d*). An easement annexed to A's farm to go to his neighbour B's tank to water A's cattle, or to B's well to draw water for the use of A's household.

(*e*). An easement annexed to A's land to throw back upon the lands of riparian owners higher up a natural stream water which, unless so thrown back, would pass from such lands.

(*f*). An easement annexed to A's land to discharge the water of a natural stream upon B's land lying lower down the stream, either polluted or with the force of its natural current increased or diminished.

(*g*). An easement annexed to A's dock to place the vessels therein so that their bowsprits project over B's wharf.

(*h*). An easement annexed to A's house to burn corpses on B's land.

(*i*). An easement annexed to A's land to thresh grain on B's field.

The following are negative easements:—

(*j*). An easement annexed to B's house to receive light and air by its windows without obstruction by his neighbour A. This binds A to refrain, for the beneficial enjoyment of B's house, from exercising his right to build on his own land.

(*k*). An easement annexed to A's land encumbered by buildings, to receive the support of his neighbour B's soil. This binds B to refrain, for the beneficial enjoyment of A's land, from exercising his right to excavate his own soil.

(*l*). An easement annexed to A's house to insert beams in, or to place beams on, his neighbour B's wall. This binds B to refrain, for the beneficial enjoyment of A's house, from exercising his right to pull down his own wall.

(*m*). An easement annexed to A's house to discharge the rain running from its roof upon his neighbour B's land. This binds B to refrain, for the beneficial enjoyment of A's house, from exercising his right to build on his own land so as to prevent the discharge.

(*n*). A customary easement annexed to B's house to restrain his neighbour A from opening doors or windows in such a position as to command a view into B's housetop or courtyard. This binds A to refrain, for the beneficial enjoyment of B's house, from exercising his right to make openings in his own walls of such a character as to interfere with B's privacy.

Bill, s. 6.

Continuous and discontinuous, apparent and non-apparent, easements.

6. Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose exercise is or may be continual without the act of man.

A discontinuous easement is one that needs the act of man for its exercise.

An apparent easement is one that has some permanent visible sign of its existence.

A non-apparent easement is one that has no such sign.

Illustrations.

(*a*). A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.

(*b*). A right of way annexed to A's house over B's land. This is a discontinuous easement.

(*c*). Rights annexed to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain. These are apparent easements.

(*d*). A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.

Bill, s. 14.

Easement for limited time or on condition.

7. An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or

exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

Bill, s. 7.

8. Easements are restrictions of one or other of the following rights (namely) :—

Easements restrictive of certain rights.

(*a*). The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

Exclusive right to enjoy.

(*b*). The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Rights arising from situation.

Illustrations.

(*a*). The exclusive right of every owner of land in a town to build thereon, subject to any municipal law for the time being in force.

N.-W. P. (1870) pp. 169, 182.

(*b*). The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(*c*). The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

Recognised by the High Court, N.-W. P., No. 1143 of 1878, 28th November, 1878, *Mahadeo Misser* v. *Phaikoo Singh*.

(*d*). The right of every owner of land to so much light and air as pass vertically thereto.

(*e*). The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the "subjacent and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

Mayor of Birmingham v. *Allen*, 46 L. J. Ch.

(*f*). The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land, shall not, before so passing or percolating, be unreasonably polluted by other persons.

(*g*). The right of every owner of land to collect, and dispose within his own limits of, all water under the land and all water on its surface which does not pass in a defined channel.

Marshall 506.

(*h*). The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature: the right of every owner of land abutting on a natural lake or pond, into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

L. R. 6 Ind. App. 33: 3 W. R. 218: 13 W. R. 48: 8 W. R. 525.

(*i*). The right of every owner of upper land that water naturally rising in or falling on such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

20 W. R. 287.

(*j*). The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes, and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon: provided that he does not thereby cause material injury to other like owners.

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

CHAPTER II.—The Imposition, Acquisition and Transfer of Easements.

Bill, s. 8.

Who may impose easements.

9. An easement may be imposed by any one in the circumstances and to the extent in and to which he may transfer his interest in the servient heritage.

Illustrations.

(*a*). A is tenant of B's land under a lease for an unexpired term of twenty years and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(*b*). A is tenant for his life of certain land with remainder to B absolutely. A cannot, unless with B's consent, impose an easement thereon which will continue after the determination of his life-interest.

(*c*). A, B and C are co-owners of certain land. A cannot, without the consent of B and C, impose an easement on the land or on any part thereof.

(*d*). A and B are lessees of the same lessor, A of a field X for a term of five years, and B of a field Y for a term of ten years. A's interest under his lease is transferable; B's is not. A may impose on X, in favour of B, a right of way terminable with A's lease.

(*e*). A is the trustee of certain land for the benefit of B. A cannot, without the consent of B, impose an easement on the trust property.

Bill, s. 9.

Servient owner.

10. Subject to the provisions of section nine, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Illustrations.

(*a*). A has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of B's stream. B may grant to C the right to divert the water of the stream from noon to sunset: provided that A's supply is not thereby diminished.

(*b*). A has, in respect of his house, a right of way over B's land. B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: provided that A's right of way is not thereby obstructed.

Bill, s. 10.

Lessor and mortgagor.

11. Subject to the provisions of section nine, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient within the meaning of the Transfer of Property Act, section sixty-three. But

a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Lessee.

No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest or in derogation of the right of the lessor or the superior proprietor.

Who may acquire easements.

12. An easement may be acquired by the owner of the dominant heritage or, on his behalf, by any person in possession of the same. Bill, s. 11.

One of two or more co-owners may, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of the heritage held in co-ownership.

No lessee of immoveable property can acquire, for the beneficial enjoyment of other immoveable property of his own, an easement in or over the property comprised in his lease. 7 Mad. 64.

Easements of necessity.

13. Where one person transfers or bequeathes immoveable property to another,—

(*a*) if an easement in other immoveable property of the transferor or testator is absolutely necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement, or

(*b*) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or the legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(*c*) if an easement in the subject of the transfer or bequest is absolutely necessary for enjoying other immoveable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement, or

(*d*) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor or the legal representative of the testator shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,— 8 Bom. 181.

(*e*) if an easement over the share of one of them is absolutely necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(*f*) if such an easement is apparent and continuous and necessary for enjoying the share of the latter, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (*a*), (*c*) and (*e*), are called easements of necessity.

Where immoveable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations.

(*a*). A sells B a field, inaccessible except by passing over A's adjoining land, or by trespassing on the land of a stranger. B is entitled to a right of way over A's adjoining land to the field sold.

(*b*). A, the owner of two fields, sells one to B, and reserves the other. The field reserved is inaccessible except by passing over the field sold to B. A is entitled to a right of way over B's field to the field reserved.

(*c*). A grants B the minerals under a certain field belonging to A. B is entitled, if there is no other way by which he can lawfully gain the minerals, to dig through the surface of the field and to carry the minerals over it.

(*d*). A sells B a house, with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the grant took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.

(*e*). A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the grant took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's lands.

(*f*). A is the owner of a house and adjoining land. The house has windows overlooking the land. A simultaneously sells the house to B and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale was made. Here A impliedly grants B a right to the light and C takes the land subject to the restriction that he may not build so as to obstruct such light.

(*g*). A is the owner of a house and adjoining land. The house has windows overlooking the land. A, retaining the house, sells the land to B, without reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.

(*h*). A sells B a factory. B is entitled, as against A, to pollute the air, when necessary, with smoke and vapours from the factory.

(*i*). A, the owner of two adjoining houses, Y and Z, sells Y to B, and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale was made, and A is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale was made.

(*j*). A, the owner of the two adjoining buildings, sells one to B, retaining the other. B is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.

(*k*). A, the owner of two adjoining buildings, sells one to B, and the other to C. C is entitled to lateral support from B's building, and B is entitled to lateral support from C's building.

(*l*). A grants land to B for the purpose of building a house thereon. B is entitled to such amount of lateral and subjacent support from A's land as is necessary for the safety of the house.

(*m*). Under the Land Acquisition Act, 1870, the officer of a railway company compulsorily acquires a portion of B's land for the purpose of making a siding. The company is entitled to such amount of lateral support from B's adjoining land as is essential for the safety of the siding.

(*n*). Owing to the partition of joint property, A becomes the owner of an upper room in a building and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

(*o*). A lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right of way over that land suitable to the business to be carried on by B in the house and grounds.

(*p*). A lets land to B, but excepts all the trees of a certain age growing on the land. A and the intending purchasers of the trees are entitled to a right of way over the land for the purpose of examining the trees. A is also entitled to a right of way over the land for the purpose of felling and removing the trees when they have attained the specified age.

14. When a right to a way of necessity is created under section thirteen, the transferor, the legal representative of the testator, or the owner of the share in which the right exists, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner. Bill, s. 13.

Direction of way of necessity.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

15. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years, Bill, s. 15. Act XV of 1877, s. 26.

Acquisition by prescription.

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative), has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support, way, watercourse, use of water or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed and it is apparent from the agreement that such right has not been granted as an easement, or if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption within the meaning of this section, unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruc-

tion is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.—In the case of an easement of support, where the soil of the dominant heritage is subjected to artificial pressure not externally apparent, or where the outward thrust of things affixed thereto is enhanced by causes not externally apparent, the said period of twenty years begins when the circumstance by which the burden on the servient heritage is increased becomes known to the servient owner.

Explanation V.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

Illustrations.

(*a*). A suit is brought in 1881 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from first January 1860 to first January 1880. The plaintiff is entitled to judgment.

(*b*). In a like suit also brought in 1881, the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1858 to 1878. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(*c*). In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed 'as an easement' for twenty years.

(*d*). In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed 'as of right' for twenty years.

Bill, s. 16, Act XV of 1877, s. 27.

16. Provided that, when any land or water upon, over, or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Exclusion in favour of reversioner of servient heritage.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty five years; but B shows that during ten

of these years C had a life-interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Bill, s. 17.

17. Easements acquired under section fifteen are said to be acquired by prescription, and are called prescriptive rights.

Rights which cannot be acquired by prescription.

None of the following rights can be so acquired:—

(*a*) a right which would tend to the total destruction of the servient heritage or the subject of the right;

(*b*) a right which would be inconsistent with, and not subordinate to, an actual and existing grant made by the servient owners;

(*c*) a right to the free passage of light or air to an open space of ground;

(*d*) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise;

(*e*) a right to underground water not passing in a defined channel.

Explanation.—In this section the expression 'servient owner' means the person who, in case the acquisition referred to were made, would be the owner of the property on which liability would be imposed; and the expression 'servient heritage' means such property.

New.

18. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Customary easements.

Illustrations.

(*a*). By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A, having bought a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(*b*). By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.

Bill, s. 19.

19. Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Transfer of dominant heritage passes easement.

Illustration.

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representative so long as the lease continues.

CHAPTER III.—The Incidents of Easements.

Bill, s. 20.

20. The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the subject-matter and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Rules controlled by contract or title.

And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

Incidents of customary easements.

Bill, s. 21.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Bar to use unconnected with enjoyment.

Illustrations.

(*a*). A, as owner of a farm, Y, has a right of way over B's land to Y. Lying beyond Y, A has another farm, Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

(*b*). A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers, for this is a purpose connected with the enjoyment of the dominant heritage. So if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

Bill, s. 22.

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

Exercise of easement.

Confinement of exercise of easement.

Illustrations.

(*a*). A has a right of way over B's field. A must enter the way at either end, and not at any intermediate point.

(*b*). A has a right annexed to his house to cut thatching grass in B's swamp. A when exercising his easement must cut the grass so that the plants may not be destroyed.

Bill, s. 23.

23. Subject to the provisions of section twenty-two, the dominant owner may from time to time alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Right to alter mode of enjoyment.

Punjab Record, 1867, p. 156.

Exception.—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient tenement.

Illustrations.

(*a*). A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.

(*b*). A has a right to discharge on B's land the rain-water from the eaves of A's house. This does not entitle A to advance his eaves if by so doing he imposes a greater burden on B's land.

(*c*). A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the

stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.

(*d*). A, a riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.

Bill, s. 24.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair as far as practicable the damage (if any) caused by the act to the servient tenement.

Right to do acts to secure enjoyment.

Accessory rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

Illustrations.

(*a*). A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(*b*). A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain, to adapt it to the new sewer: provided that he does not thereby impose any additional burden on B's land.

(*c*). A, as owner of a certain house, has a right of way over B's land. The way is out of repair, or a tree is blown down and falls accross it. A may enter on B's land and repair the way or remove the tree from it.

(*d*). A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.

(*e*). A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.

(*f*). A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.

(*g*). A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away by an inundation. A may enter upon B's land and repair the dam.

Bill, s. 25.

25. The expenses incurred in constructing works, or making repairs, or doing any other acts necessary for the user or preservation of an easement, must be defrayed by the dominant owner.

Liability for expenses necessary for preservation of easement.

Bill, s. 26.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

Liability for damage from want of repair.

Bill, s. 27.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement; but he must not do any act tending to restrct the easement or to render its exercise more inconvenient.

N.-W. P. (1867), p. 191.

Servient owner not bound to do anything.

Illustrations.

(*a*). A as owner of a house has a right to lead water and send sewage through B's land. B is not bound as servient owner to clear the watercourse or scour the sewer.

(*b*). A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed; but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(*c*). A, in respect of his house is entitled to an easement of support from B's wall. B is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(*d*). A, in respect of his mill, is entitled to a watercourse through B's land. B must not drive stakes so as to obstruct the watercourse.

(*e*). A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees, so as to obstruct the passage to A's windows of that quantity of light.

Bill, s. 28.

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:—

Extent of easements.

Easement of necessity.

An easement of necessity is co-extensive with the necessity.

Other easements.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose—

Right of way.

(*a*) a right of way of any one kind does not include any other kind:

Right to light or air acquired by grant.

(*b*) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by assurance or will, is the quantity of light or air that entered the opening at the time the assurance was made or the testator died:

Prescriptive right to light or air.

(*c*) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening, is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period, irrespectively of the purposes for which it has been used:

Prescriptive right to pollute air and water.

(*d*) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose; and

Other prescriptive rights.

(*e*) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

Bill, s. 29.

Increase of easements.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionateiy increased, and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations.

(*a*). A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.

(b). A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(*c*). A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B's land. A buys a field and unites it to his farm. A is not thereby entitled to take leaves to manure this field.

Bill, s. 30.

Partition of dominant heritage.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: provided that such annexation is consistent with the terms of the instrument or decree (if any) under which the division was made or the easement was imposed and, in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations.

(*a*). A house, to which a right of way by a particular path is annexed, is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(b). A house, to which is annexed the right of drawing water from a well to the extent of fifty buckets a day, is divided into two distinct heritages, one of which is granted to A, the other to B. A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day, but the amount drawn by both must not exceed fifty buckets a day.

(*c*). A, having in respect of his house an easement of light, divides the house into three distinct heritage. Each of these continues to have the right to have its windows unobstructed.

Bill, s. 31.

Obstruction in case of excessive user.

31. In case of excessive user of an easement, the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration.

A, having a right to the free passage over B's land of light to four windows, six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive user.

CHAPTER IV.—The Disturbance of Easements.

Bill, s. 32.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

Illustration.

A, as owner of a house, has a right of way over B's land. C unlawfully enters on B's land, and obstructs A in his right of way. A may sue C for compensation, not for the entry, but for the obstruction.

Bill, s. 33.

Suit for disturbance of easement.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto: provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section thirty-five.

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial, within the meaning of the section, unless it falls within the first explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial, within the meaning of this section, if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations.

(*a*). A places a permanent obstruction in a path over which B, as tenant of C's house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.

(*b*). A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah overhanging the way about ten feet from the ground and so as not to occasion any inconvenience to foot-pasengers using the way. This is not substantial damage to A.

When cause of action arises for removal of support.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

Bill, s. 35.

Polluting air and water previously impure.

35. The circumstance that air or water, the subject of an easement, is already polluted by similar or different means does not, of itself, deprive the dominant owner of his right to recover compensation from any person who adds to the pollution.

Bill, s. 36.

Suit for continuing disturbance.

36. Where the disturbance of an easement is continued after compensation has been recovered for the original act of disturbance, another suit may be instituted for compensation for the continuance; and the decision in the former suit is no bar to the latter.

Bill, s. 37.

Injunction to restrain disturbance.

37. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement—

(*a*) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this chapter:

(*b*) if the disturbance is only threatened or intended,—when the act threatended or intended must necessarily, if performed, disturb the easement.

Bill, s. 38. 7 Mad. H. C. Rulings, XXXV.

Abatement of obstruction of easement.

38. Notwithstanding the provisions of section twenty-four, the dominant owner cannot himself abate a wrongful obstruction of an easement.

CHAPTER V.—The Extinction, Suspension and Revival of Easements

Bill, s. 39.

Extinction by dissolution of right of servient owner.

39. When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section eleven.

Illustrations.

(*a*). A transfers Sultanpur to B on condition that he does not marry C. B imposes an easement on Sultanpur. Then B marries C. B's interest in Sultanpur ends, and with it the easement is extinguished.

(*b*). A, in 1860, lets Sultanpur to B for thirty years from the date of the lease. B, in 1861, imposes an easement on the land in favour of C, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. B's interest in Sultanpur then ends, and with it C's easement.

(*c*). A and B, tenants of C, have permanent transferable interests in their respective holdings. A imposes on his holding an easement to draw water from a tank for the purpose of irrigating B's land. B enjoys the easement for twenty years. Then A's rent falls into arrear and his interest is sold. B's easement is extinguished.

(*d*). A mortgages Sultanpur to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of section eleven. The land is sold to D in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

Bill, s. 40.

Extinction by release.

40. An easement is extinguished when the dominant owner releases it, exepressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I.—An easement is impliedly released—

(*a*) where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority;

(*b*) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations.

(*a*). A, B and C are co-owners of a house to which an easement is annexed. A, without the consent of B and C, releases the easement. This release is effectual only as against A and his legal representative.

(*b*). A grants B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual.

(*c*). A, having the right to discharge his eavesdroppings into B's yard, expressly authorizes B to build over this yard to a height which will interfere with the discharge. B builds accordingly. A's easement is extinguished.

(*d*). A, having an easement of light to a window, builds up that window with bricks and mortar, so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(*e*). A, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on B's land, alters the roof, so as to direct the rain-water into a different channel and discharge it on C's land. The easement is impliedly released.

Bill, s. 41.

Extinction by revocation.

41. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

Bill, s. 42.

Extinction on expiration of limited period or happening of dissolving condition.

42. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

Bill, s. 43.

Extinction on termination of necessity.

43. An easement of necessity is extinguished when the necessity comes to an end.

Illustrations.

A grants B a field inaccessible except by passing over A's adjoining land. B afterwards purchases a part of that

land over which he can pass to his field. The right of way over A's land, which B had acquired, is extinguished.

Bill, s. 44.

44. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

Extinction of useless easement.

45. An easement is extinguished—

Bill, s. 45.

(*a*) where the dominant heritage is substantially changed and it is not proved that the easement was intended to continue annexed thereto notwithstanding such change, or

Extinction by substantial change of dominant heritage.

(*b*) where, by any change in the dominant heritage, the burden on the servient heritage is materially increased, and cannot be reduced to its original limits, and it is not proved that the burden was intended to be increased by such change.

Extinction by material and permanent increase of burden.

Bill, s. 46.

46. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer exercise his right:

Extinction on permanent alteration of servient heritage by superior force.

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage, and the provisions of section fourteen apply to such way.

Illustrations.

(*a*). A grants to B, as the owner of a certain house, a right to fish in a river running through A's land. The river changes its course permanently, and runs through C's land. B's easement is extinguished.

(*b*). Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished.

Bill, s. 47.

47. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Extinction by destruction of either heritage.

Illustration.

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished.

Bill, s. 48.

48. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

Extinction by unity of ownership.

Illustrations.

(*a*). A, as the owner of a house, has a right of way over B's field. A mortgages his house, and B mortgages his field, to C. Then C forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(*b*). The dominant owner acquires only part of the servient heritage: the easement is not extinguished, except in the case illustrated in section 43.

(*c*). The servient owner acquires the dominant heritage in common with a third person: the easement is not extinguished.

(*d*). The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages: the easements are not extinguished.

(e). The joint owners of the dominant heritage jointly acquire the servient heritage: the easement is extinguished

(f). A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(g). A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished.

Bill, s. 49.

49. A continuous easement is extinguished when it totally ceases to be used as such for an unbroken period of twenty years.

Extinction by non-user.

A discontinuous easement is extinguished when, for a like period, it has not been exercised or the dominant owner has not registered under the Indian Registration Act, 1877, a declaration of his intention to retain the easement.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its exercise was obstructed by the servient owner, or rendered impossible by the dominant owner, and in the case of a discontinuous easement, from the day on which it was last exercised by any person as annexed to the dominant heritage, or the day on which the dominant owner registers the said declaration.

Where an easement is exercisible only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its exercise during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be exercised, or that a right accessory thereto was exercised, or that the dominant owner was not aware of its existence, or that he exercised it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(a) when the cessation is in pursuance of a contract between the dominant and servient owners;

(b) when the dominant heritage is held in co-ownership, and one of the co-owners exercises the easement within the said period, or

(c) when the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

Illustration.

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

Bill, s. 50.

50. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished

Extinction of accessory rights.

Illustration.

A has an easement to draw water from B's well. As accessory thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section forty-nine. The right of way is also extinguished.

Bill, s. 51.

Suspension of easement.

51. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

Bill, s. 52.

Servient owner not entitled to require continuance, nor to compensation for suspension.

52. The servient owner has no right to require that an easement be continued; and, notwithstanding the provisions of section twenty-six, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Where such notice has not been given, the servient owner is entitled to compensation for damage done to the servient heritage by such extinguishment or suspension.

Illustration.

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

Bill, s. 53.

Revival of easements.

53. An easement extinguished under section forty-seven revives (*a*) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion, (*b*) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site, and (*c*) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient tenement.

An easement extinguished under section forty-eight revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section forty-nine.

Illustration.

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z

for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C or surrenders it to B, the right of way revives.

CHAPTER VI.—LICENSES.

"License" defined.

54. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

Who may grant license.

55. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interest in the property affected by the license.

Grant may be express or implied.

56. The grant of a license may be express or implied from the conduct of the grantor; and an agreement purporting to create an easement, which is ineffectual for that purpose, may operate to create a license.

Accessory licenses annexed by law.

57. All licenses necessary for the enjoyment of any interest or the exercise of any right are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

Illustration.

A sells the trees growing on his land to B. B is entitled to go on the land and take away the trees.

"It is founded on personal confidence," 2 Kent 583.

License when transferable.

58. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.

Illustration.

A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immoveable property of B. The right cannot be transferred.

Grantor's duty to disclose defects.

59. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is and the licensee is not aware.

Grantor's duty not to render property unsafe.

60. The grantor of a license is bound not to do anything likely to render the property affected by the license unsafe to the licensee.

17 Q. B. 574.

Grantor's transferee not bound by license.

61. When the grantor of the license transfers the property affected thereby, the transferee is not bound by the license.

License when revocable.

62. A license may be revoked by the grantor, unless

Gale 69.

(*a*) it is coupled with a transfer of property and such transfer is in force:

(*b*) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

Revocation express or implied.

63. The revocation of a license may be express or implied.

Illustrations.

(*a*) A, the owner of a field, grants a license to B to use a path across it. A, with intent to revoke the license, locks a gate across the path. The license is revoked.

(*b*) A, the owner of a field, grants a license to B to stack hay on the field. A lets or sells the field to C. The license is revoked. Gale 65.

License when deemed revoked.

64. A license is deemed to be revoked— 3 Kent 582.

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license:

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative:

(*c*) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance of a specified act, and the period expires or the condition is fulfilled:

(*d*) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right:

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the license:

(*f*) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable:

(*g*) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist:

(*h*) where the license totally ceases to be used as such for an unbroken period of twenty years and such cessation is not in pursuance of a contract between the grantor and the licensee:

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

Licensee's rights on revocation.

65. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property. L. R. 5 C. P. 334: L. R. 9. Q. B. 400.

Licensee's rights on eviction.

66. Where a license has been granted for consideration and the licensee without any fault of his own is evicted by the licensor before he has fully enjoyed under the license the right for which he contracted, he is entitled to recover compensation from the licensor.

D

THE TRUSTS BILL, 1879.

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THE SCHEDULE.

A

BILL

TO

Define and amend the law relating to Private Trusts and Trustees.

[AS REVISED BY THE INDIAN LAW COMMISSION, 1879.]

Trusts in India of various kinds, 18 W. R. (P. C.) 359. Trusts for benefit of creditors, 1 Bomb. 283: 9 Bomb. 249: 10 Bomb. 327. Trustee misapplying trust-funds, Suth. F. B. 60. As to family religious trusts, 10 Beng. 19: Norton, II, 406. As to pagoda-trustees, see 1 Mad. 415: 7 Mad. 77: Act XX of 1863. Property purchased in name of an idol, 15 Beng. 176.

WHEREAS it is expedient to define and amend the law relating to private trusts and trustees; It is hereby enacted as follows:—

Preamble.

CHAPTER I.

PRELIMINARY.

Short title. Commencement.

1. This Act may be called "The Trusts Act, 1879:" and it shall come into force on the first day of March, 1880.

Local extent. Savings.

It extends to the whole of British India; but nothing herein contained affects the rules of Muhammadan law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second chapter of this Act applies to trusts created before the said day.

Repeal of enactments.

2. On and from that day the Statutes and Acts mentioned in the schedule hereto annexed shall be repealed to the extent therein mentioned.

Bill, s. 3.

Interpretation-clause.

3. A "trust" is an obligation annexed to the ownership of property and arising out of a confidence

"trust":

reposed in and accepted by the owner or declared and accepted by him for the benefit of another, or of another and the owner;

"author of the trust":

the person who reposes or declares the confidence is called the "author of the trust": the person who accepts the confidence is called the "trustee": the

"trustee":

person for whose benefit the confidence is accepted is

"beneficiary":

called the "beneficiary":

"trust-property":
"beneficial interest":
"interest":

the subject-matter of the trust is called "trust-property", or "trust-money"; the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust-property; and the

"instrument of trust":

instrument, if any, by which the trust is declared is called the "instrument of trust":

"breach of trust":

A breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust":

and in this Act, unless there be something repugnant in the subject or context, "registered" means registered under the law for the registration of documents for the time being in force: a person is said to have "notice" of a fact either when he actually knows that fact or when, but for wilful abstention from enquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229; and all expressions used herein and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively attributed to them by that Act.

"registered":

"notice":

Expressions defined in Act IX of 1872.

e. g., 'fraud,' s. 27 *infra*.

CHAPTER II.

Of the Creation of Trusts.

4. A trust may be created for any lawful purpose. The purpose of a trust is lawful, unless it is (*a*) forbidden by law, or (*b*) is of such a nature that if permitted it would defeat the provisions of any law, or (*c*) is fraudulent, or (*d*) involves or implies injury to the person or property of another, or (*e*) the Court regards it as immoral or opposed to public policy.

Lawful purpose.

Bill, s. 10. 9 Beng. 377; Act IX of 1872, s. 23. Beng. Regn. II of 1793, s. 19, forbids Collectors to make their subordinates their trustees. Perpetuity, 14 Beng. 175. When Court will interfere, L.R. 9 Eq. 475.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Explanation.—In this section, the expression "law" includes, where the trust-property is immoveable and situate in a foreign country, the law of such country.

See *Nelson* v. *Bridport*, 8 Beav. 547.

Illustrations.

(*a*) A conveys property to B in trust to apply the profits to the nature of female foundlings to be trained up as prostitutes. The trust is void.

Act X of 1865, s. 101; 2 Spence 24.

(*b*) A conveys property to B in trust for C for his life and after his death to D for his life, and after D's death to such of the sons of D as shall first attain the age of 25. A, B, C and D are persons to whom the Indian Succession Act, 1865, applies. The trust after D's death is void.

(*c*) A bequeathes property to B in trust to employ it in carrying on a smuggling business, and out of the profits thereof to support A's children. The trust is void.

(*d*) A, while in insolvent circumstances, transfers property to B in trust for A during his life, and after his death for B. A is declared an insolvent. The trust for A is invalid as against his creditors.

5. No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or the trustee.

Trust of immoveable property.

Bill, s. 5.

Trust of moveable property.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

Lewin, 7th edition, p. 57; Underhill 37, 40.

These rules do not apply where they would operate so as to effectuate a fraud.

Bill, ss. 6, 7. Whether voluntary declaration of trust is binding against Hindu declarant, 4 Mad. 462. Transmutation of possession unnecessary, 2 Bomb. 143 (a Parsi case). Act I of 1877, s. 3: See 7 Bomb. A. C. J. 149. *Harland* v. *Trigly*, 1 Brown, Ch. 124. *Green* v. *Marsden*, 1. Drew. 646. *Palmer* v. *Simmonds*, 2 Drew. 221. *Messenger* v. *Andrews*, 4 Russ. 478.

Creation of trust.

6. Subject to the provisions of section five, a trust is created when the author of the trust indicates with reasonable certainty, by any words or acts, (*a*) an intention on his part to create thereby a trust, (*b*) the purpose of the trust, (*c*) the beneficiary, and (*d*) the trust-property, and (unless the trust is declared by will, or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee.

Illustrations.

(*a*) A bequeathes certain property to B, "having the fullest confidence that he will dispose of it for the benefit of C." This creates a trust so far as regards A and C.

(*b*) A bequeathes certain property to B, "hoping he will continue it in the family." This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(*c*) A bequeathes certain property to B, requesting him to distribute it amongst such members of C's family as B should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(*d*) A bequeathes certain property to B, desiring him to divide the bulk of it among C's children. This does not create a trust, for the trust-property is not indicated with sufficient certainty.

(*e*) A bequeathes a shop and stock-in-trade to B on condition that he pays A's debts and a legacy to C. This is a condition, not a trust for A's creditors and C.

Bill. s. 8. of Act IX of 1872, ss. 11 and 12.

Who may create trusts.

7. A trust may be created—

(*a*) by every person competent to contract, and

(*b*) with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property.

Subject of trust.

8. The subject-matter of a trust must be property transferable to the beneficiary.

It must not be a merely beneficial interest under a subsisting trust.

Bill, s. 9, para. 1. 'Person' includes 'corporation (Act 1 of 1868) but the statutes of Mortmain are not in force in India.

Who may be beneficiary.

9. Every person capable of holding property may be a beneficiary.

Disclaimer by beneficiary.

A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of he trust, a claim inconsistent therewith.

Bill, s. 9, para. 2. *King* v. *Bellard*, 1 H. & M. 343: Act IX of 1872, s. 11.

Who may be trustee.

10. Every person capable of holding property may be a trustee; but where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract.

No one bound to accept a trust.

No one is bound to accept a trust. Bill, s. 10. Lewin 180.

Acceptance of trust.

Subject to the provisions of section five, a trust is accepted by any words or acts of the trustee, indicating with reasonable certainty such acceptance. N. Y. Code, § 1174, requires a consideration in case of acknowledgment.

Disclaimer of trust.

Instead of accepting a trust, the intended trustee may, within a reasonable period, disclaim it, and such disclaimer shall prevent the trust-property from vesting in him. Disclaimer may be by parol. *Bingham* v. *Ld. Clanmorris*

A disclaimer by one of two or more co-trustees vests the trust-property in the other or others and makes him or them sole trustee or trustees from the date of the creation of the trust. *Mucklow* v. *Fuller*, Williams Exors., 1287, 1796.

Illustrations.

(*a*) A bequeathes certain property to B and C, his executors as trustees for D. B and C prove A's will. This is, in itself, an acceptance of the trust, and B and C hold the property in trust for D. *Sheridan* v. *Joyce*, 1 Jones & Lat. 401.

(*b*) A transfers certain property to B, in trust to sell it and to pay out of the proceeds A's debts. B accepts the trust and sells the property. So far as regards B, a trust of the proceeds is created for A's creditors.

(*c*) A bequeathes a lakh of rupees to B upon certain trusts and appoints him his executor. B severs the lakh from the general assets and appropriates it to the specific purpose. This is an acceptance of the trust.

CHAPTER III.

Of the Duties and Liabilities of Trustees.

Trustee to execute trust.

11. The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract. Bill, s. 11, N. Y. Code, § 1196: Lewin 190.

Where the beneficiary is incompetent to contract, his consent may, for the purpose of this section, be given by a principal Civil Court of original jurisdiction.

Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

Explanation.—Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (*a*) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death, and (*b*) in the case of debts not bearing interest, to make such payment without interest. Lewin 471. Lewin 477.

Illustrations.

(*a*). A, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(*b*). A, a trustee for X, Y and Z, is authorized to sell certain land to B for a specified sum. X, Y and Z, being competent to contract, consent that A may sell the land to C for a less sum. A may sell the land to C for the latter sum.

Boss v. *Godsal*, Lewin 291: 2 Spence 926 n. Another case, *Morris* v. *M.* 4 Jur. N. S. 802.

(*c*). A, a trustee for B and her children, is directed by the author of the trust to lend, on B's request, trust-property to B's husband, C, on the security of his bond. C becomes insolvent, and B requests A to make good the loan. A may refuse to make it.

Bill, s. 12. Lewin 190, 243, 264, 268.

Trustee to inform himself of state of trust-property.

12. A trustee is bound to acquaint himself as soon as possible with the nature and circumstances of the trust-property; to obtain, where necessary, a transfer of the trust-property to himself; and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

Lewin 533: 3 V. & B. 359.

Illustrations.

4 Moo. I. A. 452.

(*a*). The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

Lewin 216: 2 Spence 929: *Bái Jadáv* v. *Tribhuvandás*. 9 Bomb. 333.

(*b*). The trust property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustee must not allow the former to retain the money for a longer period than the circumstances of the case require.

Bill s. 13. Spence 46, 186, 923: Act I of 1877, 10, expl. 1.

Trustee to protect title to trust-property.

13. A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the amount or value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

Lewin 270.

Illustration.

See *Macnamara* v. *Carey*. 1 Ir. L. R. Eq. 9, cited Lewin 771.

The trust-property is immoveable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877, the trustee's duty is to cause the instrument to be registered.

Bill, s. 18. Lewin 262: Underhill 121.

Trustee not to set-up title adverse to beneficiary.

14. The trustee must not for himself or another set-up or aid any title to the trust-property adverse to the interest of the beneficiary.

Bill, s. 14. Lewin 270: 2 Spence 917, 933: Act IX of 1872, ss. 151, 152: N. Y. Code, s. 1197.

Care required from trustee.

15. A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property.

Illustrations.

Lewin 234: Burge III, 968.

(*a*). A, living in Calcutta, is a trustee for B, living in Bombay. A remits trust-funds to B, by bills drawn by a person of undoubted credit in favour of the trustee as such, and payable at Bombay. The bills are dishonoured. A is not bound to make good the loss.

2 Spence 933: Grant's *Bankers*, third edition, 351.

(*b*). A, a trustee of leasehold property, directs the tenant to pay the rents on account of trust to a banker, B, then in credit. The rents are accordingly paid to B, and A leaves the money with B only till wanted. Before the money is drawn out, B becomes insolvent, A having had no reason to believe that B was in insolvent circumstances. A is not bound to make good the loss.

(*c*). A, a trustee of two debts for B, releases one and compounds the other, in good faith and reasonably believing that it is for B's interest to do so. A is not bound to make good any loss caused thereby to B.

(*d*). A, a trustee directed to sell the trust-property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting competition. A is bound to make good the loss caused thereby to the beneficiary. Lewin 389 : Dart 69.

(*e*). A, a trustee for B, in execution of his trust, sells the trust-property, but from want of due diligence on his part fails to receive part of the purchase-money. A is bound to make good the loss thereby caused to B. 47 L. J. Ch. 606.

(*f*). A, a trustee for B of a policy of insurance, has funds in hand for payment of the premiums. A neglects to pay the premiums, and the policy is consequently forfeited. A is bound to make good the loss to B. Lewin 770-1.

(*g*). A bequeathes certain moneys to B and C as trustees, and authorizes them to continue trust-moneys upon the personal security of a certain firm in which A had himself invested them. A dies and a change takes place in the firm. B and C must not permit the moneys to remain upon the personal security of the new firm. *Cummins* v. *Cummins*, 3 J. & L. 64.

(*h*). A, a trustee for B, allows the trust to be executed solely by his co-trustee C. C misapplies the trust-property. A is personally answerable for the loss resulting to B.

Conversion of perishable property.

16. Where the trust is created for the benefit of several persons in succession, and the trust-property is of a wasting nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust, to convert the property into property of a permanent and immediately profitable character. Bill, s. 16. Lewin 274, 280: Dart 59.

Illustrations.

(*a*). A bequeathes to B all his property in trust for C during his life, and on his death for D, and on D's death for E's. A's property consists of three leasehold houses, and there is nothing in A's will to show that he intended the houses to be enjoyed in specie. B should sell the houses, and invest the proceeds in accordance with section twenty.

(*b*). A bequeathes to B his three leasehold houses in Calcutta and all the furniture therin in trust for C during his life, and on his death for D, and on D's death for E. Here an intention that the houses and furniture should be enjoyed in specie appears clearly, and B should not sell them.

Trustee to be impartial.

17. Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another. Bill, s. 17. *Ellis* v. *Barker*, 7 Ch. Div. 104.

Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably and in good faith of such discretion. Dart 89, citing *Minet* v. *Leman*, 20 Beav. 269.

Illustrations.

A, a trustee for B, C and D, is empowered to choose between several specified modes of investing the trust-property. A in good faith chooses one of these modes. The Court will not interfere, although the result of the choice may be to vary the relative rights of B, C and D.

Trustee to prevent waste.

18. Where the trust is created for the benefit of several persons in succession, and one of them is in possession of the trust-property, if he commits, or threatens to commit, any act which is destructive or permanently injurious Bill, s. 15. Keer 79 : but see Lewin 351. The trustee is not responsible for suffering permissive waste.

thereto, the trustee must take measures to prevent such act.

Bill, s. 19. Lewin 591: 2 Spence 921.

Accounts and information.

19. A trustee is bound (*a*) to keep clear and accurate accounts of the trust-property, and (*b*), at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property.

Lewin 591.

Bill, s. 20. Act XXVIII of 1866, ss. 5 and 32. As to the necessity of some such provisions, see *DeSouza*, v. *DeSouza*, 12 Bom. 134. cf. 23 & 24 Vic., c. 145, s. 25.

Investments of trust-money.

20. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee must (subject to any direction contained in the instrument of trust) invest the money on the following securities and on no others :—

(*a*) in promissory notes, debentures, stock or other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland ;

(*b*) in bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India ;

cf. 32 & 33, Vic., c. 132, s. 2.

(*c*) in stock or debentures of, or shares in, railway or other companies, the interest whereon shall have been guaranteed by the Secretary of State for India in Council ;

cf. 34 & 35, Vic., c. 47, s. 13.

(*d*) in debentures or other securities for money issued by, or on behalf of, any municipal body, under the authority of any Act of a Legislature established in British India ;

Lewin 298: 2 Spence 925: 16 Beav. 600.

(*e*) on a first mortgage of immoveable property situate in British India : provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the mortgage money ; or,

(*f*) on any other security expressly authorised by the instrument of trust :

The Statute excepts investment on Consols.

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (*d*), (*e*) and (*f*) shall be made without his consent in writing.

27 & 28 Vic., c. 114, s. 61.

Mortgage of land pledged to Government under Act XXVI of 1871.

Deposit in Government Savings Bank.

Nothing in this section shall be deemed to preclude an investment on a mortgage of immoveable property already pledged as security for an advance under the Land Improvement Act, 1871, or, in case the trust-money does not exceed one thousand rupees, a deposit thereof in a Government Savings Bank.

Bill, s. 21, para. 2. art 58.

Sale by trustee directed to sell within specified time.

21. Where a trustee directed to sell within a specified time extends such time as between himself and the beneficiary, the burden of proving that the latter is not prejudiced by the extension lies upon the trustee, unless the extension has been authorized by a principal Civil Court of original jurisdiction.

Illustration.

A bequeathes property to B, directing him, with all convenient speed and within five years, to sell it, and apply the proceeds for the benefit of C. In the exercise of reasonable discretion, B postpones the sale for six years. The sale is not thereby rendered invalid, but C, alleging that he has been injured by the postponement, institutes a suit against B to obtain compensation. In such suit the burden of proving that C has not been injured lies on B. Lewin 390.

Transfer to beneficiary on completion of purpose.

22. When the purpose of the trust is completely fulfilled, the trustee must on demand transfer the trust-property to his beneficiary, unlesss the trustee has notice of any title in another which is paramount to the beneficiary's interest and of an intention to assert such title. Bill, s. 22. 2 Spence 47; Smith, § 3129.

Liability for breach of trust.

23. Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee. Bill, s. 23. Lewin 768. 2 Spence 936: Williams Exors. 1739. Includes a fraudulent minor: L. R. 2 Eq. 538: *Walk* v. *Symonds*. 3 Swanst. 1 W. & T. 175. 2 Spence 936.

Illustrations.

(*a*). A trustee improperly leaves trust-property outstanding and it is consequently lost. He is liable to make good the property lost, but he is not liable to pay interest thereon. Lewin 315: 4 Moo. I. A. 452. Notwithstanding indemnity clause, 29 B. 213.

(*b*). A bequeathes a house to B in trust to sell it and pay the proceeds to C. B neglects to sell the house for a great length of time, whereby the house is deteriorated and its market price falls. B is answerable to C for the loss.

(*c*). A trustee is guilty of unreasonable delay in investing trust-money in accordance with section twenty or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay. Lewin 310.

(*d*). The duty of the trustee is to invest trust-money in any of the securities mentioned in section twenty, clause (*a*), (*b*), (*c*) or (*d*). Instead of so doing, he retains the money in his hands. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and interest, or with the amount of such securities which he might have purchased with the trust-money when the investment should have been made, and the intermediate dividends and interest thereon. Lewin 307; 2 Spence 921.

(*e*). The instrument of trust directs the trustee to invest trust-money either in any of such securities, or on mortgage of immoveable property. The trustee does neither. He is liable for the principal-money and interest. 2 Spence 925 *Robinson* v. *Robinson*, 1 DeG. M. & G. 256.

(*f*). The instrument of trust directs the trustee to invest trust-money in any of such securities and to accumulate the dividends thereon. The trustee disregards the direction. He is liable at the option of the beneficiary to be charged either with the amount of the principal-money and compound interest, or with the amount of such securities which he might have purchased with the trust-money when the investment should have been made, together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends. 2 Spence 927 *Pride* v. *Fooks*, 2 Beav. 430: Lewin 315: 1 Seton 479.

(*g*). Trust-property is invested in one of the securities mentioned in section twenty, clause (*a*), (*b*) (*c*) or (*d*). The trustee sells such security for some purpose not authorized by the terms of the instrument of trust. He is liable at the option of the beneficiary either to replace the security, with the intermediate dividend and interest thereon, or to account for the proceeds of the sale with interest thereon. Lewin 308.

Lewin 770.

(*h*) The trust-property consists of land. The trustee sells the land to a purchaser for consideration without notice of the trust. The trustee is liable, at the option of the beneficiary, to purchase other land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest, or to be charged with the present estimated value of the land sold, after deducting therefrom any decrease of price caused by subsequent improvements.

Bill, s. 24. *Wiles* v. *Gresham*, 2 Drew. 258, 295.

No set-off allowed to trustee.

24. A trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

Bill, s. 25. *Tebbs* v. *Carpenter*, 1 Mad., 290: Lewin 191.

Non-liability for predecessor's default.

25. Where a trustee succeeds another he is not, as such, liable for the acts or defaults of his predecessor.

Bill, s. 26. Lewin 240, 251: Smith § 3105: Kent IV. 335: 1 Seton 462.

Non-liability for co-trustee's default.

26. Subject to the provisions of sections thirteen and fifteen, one trustee is not, as such, liable for a breach of trust committed by his co-trustee:

Provided that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is so liable—

Act I of 1877, s. 54, *Ill.* (*b*). 2 Spence 923. See *Wilkins* v. *Hogg*, 3 Giff. 116.

(*a*) where he has delivered trust-property to his co-trustee without seeing to its proper application:

(*b*) where he allows his co-trustee to receive trust-property and fails to make due enquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require:

(*c*) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

Bone v. *Cook*, M'Clel. 168.

Joining in receipt for conformity.

A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.

Illustration.

A bequeathes certain property to B and C, and directs them to sell it and invest the proceeds for the benefit of D. B and C accordingly sell the property, and the purchase-money is received by B and retained in his hands. C pays no attention to the matter for two years and then calls on B to make the investment. B is unable to do so, becomes insolvent and the purchase-money is lost. C may be compelled to make good the amount.

Bill, s. 27. No primary liability in respect of a breach of trust. *Wilson* v. *Moore*, 1 My. & K. *Lockhart* v. *Reilly*, 1 De G. and J. 476. Lewin 776.

Several liability of co-trustees.

27. Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

Contribution as between co-trustees.

But as between the trustees themselves, if one be less guilty than another, and has had to refund the loss, the former may compel the latter or his legal representative to make good

such loss, and if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Nothing in this section shall be deemed to authorise a trustee, who has been guilty of fraud, to contribution. *Lingard* v. *Bromley*, 1 V. and B. 114.

28. When any beneficiary's interest becomes vested in another person and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered. Bill, s. 29. See Underhill, p. 156.

Non-liability of trustee paying without notice of transfer by beneficiary.

29. When the beneficiary's interest is forfeited or awarded by legal adjudication to Government, the trustee is bound to hold the trust-property for the benefit of such person in such manner as the Government may direct in this behalf. New.

Liability of trustee where beneficiary's interest is forfeited to Government.

30. Subject to the provisions of the instrument of trust, and of sections twenty-three and twenty-six, trustees shall be respectively chargeable only for such moneys, stocks, funds and securities as they respectively actually receive, and shall not be answerable the one for the other of them, nor for any banker, broker or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses. Bill, s. 30. Act XXVIII of 1866, s. 37, shortened. See sections 15 & 26 *supra*.

Indemnity of trustees.

CHAPTER IV.

Of the Rights and Powers of Trustees.

31. A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust-property. Bill, s. 31. 2 Spence 46; 1 Dav. 582.

Right to title-deeds.

32. Every trustee may re-imburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about the execution of the trust or the realisation, preservation or benefit of the trust-property, or the protection or support of the beneficiary. Bill, s. 32. Lewin 506. Not interest on costs, *Gordon* v. *Trail*, 8 Price, 416.

Right to re-imbursement of expenses.

If he pays such expenses out of his own pocket, he has a first charge upon the trust-property for such expenses and interest thereon: but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted and at whose request, expressed or implied, he made the payment, the amount of such expenses. Lewin 514, 548: *Balsh* v. *Hyham*.

Lewin 324.

Right to recoupment for erroneous overpayment.

Where a trustee has by mistake made an over-payment to the beneficiary, he may re-imburse the trust-property out of the beneficiary's interest. If such interest fail, the trustee is entitled to recover from the beneficiary personally the amount of such over-payment.

Bill, s. 33. Underhill, p. 163.

Right to indemnity from gainer by breach of trust.

33. A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary, the trustee has a charge on his interest for such amount.

Nothing in this section shall be deemed to entitle a trustee to be indemnified who has in committing the breach of trust been guilty of fraud.

Bill, s. 34, Act XXVIII of 1866, s. 43: 1 Seton 493.

Right to apply to Court for opinion in management of trust-property.

34. Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust-property other than questions of detail, difficulty or importance, not proper for summary disposal.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court to which it is made.

Bill, s. 35. 2 Spence 46: Underhill, p. 164.

Right to settlement of accounts.

35. When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled, and where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect.

Bill, s. 36. Lewin 504.

General authority of trustee.

36. In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument and to the provisions of section seventeen, a trustee may do all acts which are reasonable and proper for the realisation, protection or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract.

27 & 28 Vic., c. 114: Lewin 505.

Every trustee in the actual possession or receipt of the rents and profits of land as defined in the Land Improvement Act, 1871, shall be deemed to be a landlord for the purposes of that Act.

Except with the permission of a principal Civil

Court of original jurisdiction, no trustee shall lease trust-property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably gotten.

Bill, s. 37. Act XXVIII of 1866, s. 2, extended to moveables.

Power to sell in lots, and either by public auction or private contract.

37. Where the trustee is empowered to sell any trust-property, he may sell the same either together or in lots, and either by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

Bill, s. 38. Act XXVIII of 1866, s. 3. See 1 Dav. Conv. 507.

Power to sell under special conditions.

38. The trustee making any such sale may insert such stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale, as he thinks fit; and may also buy-in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale and re-sell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Power to buy-in and re-sell.

Bill, s. 21, para. 1. Lewin 265, 390: Dart 58, 88.

Time allowed for selling trust-property.

Where a trustee is directed to sell trust-property or to invest trust-money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase.

Illustrations.

(*a*) A bequeathes property to B, directing him to sell it with all convenient speed and pay the proceeds to C. This does not render an immediate sale imperative.

Lewin 390: Dart 59.

(*b*) A bequeathes property to B, directing him to sell it at such time and in such manner as he shall think fit and invest the proceeds for the benefit of C. This does not authorise B, as between him and C, to postpone the sale to an indefinite period.

Bill, s. 39. Act XXVIII of 1866, s. 4.

Power to convey.

39. For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary.

Bill, s. 40. Act XXVIII of 1866, s. 32. See *Waite* v. *Littlewood*, 41 L. J. Ch. 636.

Power to vary investments.

40. A trustee may, at his discretion, call in any trust-property invested in any security and invest the same on any of the securities mentioned in section twenty, and from time to time vary any such investments for others of the same nature:

Provided that, where there is a person competent to contract and entitled at the time to receive the income of the trust-property for his life, or for any greater estate, no such change of investment shall be made without his consent in writing.

Bill, s. 41. Act XXVIII of 1866, s. 33.

Power to apply property of minors, &c., for their maintenance, &c.

41. Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardian (if any) of such minor, or otherwise apply for or towards his maintenance or education, or advancement in life, or the reasonable

expenses of his marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property; and such trustee shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in any of the securities mentioned in section twenty for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen: Provided that such trustee may at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Where the income of the trust-property is insufficient for the minor's maintenance or education, or advancement in life, or the reasonable expenses of his marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses.

See Acts XL of 1858, XX of 1864, and XIII of 1874.

Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors.

Bill, s. 42. Act XXVIII of 1866, s. 36, shortened.

Power to give receipts.

42. A trustee may give a receipt in writing for any money paid or property transferred to him by reason or in the exercise of any trust reposed in him, and in the absence of fraud such receipt shall discharge the person paying or transferring the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof.

Power to several trustees of whom one disclaims or dies.

43. When an authority to deal with the trust property is given to several trustees and one of them disclaims or dies, the authority may be exercised by the continuing trustees, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

Bill, s. 43. *Mitchelson* v. *Piper*, 8 Sim. 64. Qy. except power to give receipts.

Suspensions of trustee's powers by decree.

44. Where a decree has been made in a suit for the execution of a trust, the trustee must not exercise any of his powers except in conformity with such decree or with the sanction of the Court by which the decree has been made or, where an appeal against the decree is pending, of the Appellate Court.

CHAPTER V.

Of the Disabilities of Trustees.

Bill, s. 44. Lewin 230: Smith § 1138: Kent IV, 344 n.

Trustee cannot renounce after acceptance.

45. A trustee who has accepted the trust cannot afterwards renounce it, except (*a*) with the permission of a principal Civil Court of original jurisdiction, or (*b*) if the beneficiary is competent to contract, with his consent, or (*c*) by virtue of a special power in the instrument of trust.

46. A trustee cannot delegate his office, or any of his duties, either to a co-trustee or to a stranger, unless (*a*) the instrument of trust so provides, or (*b*) the delegation is in the regular course of business, or (*c*) the delegation is necessary, or (*d*) the beneficiary, being competent to contract, consents to the delegation.

Trustee cannot delegate.

Bill, s. 45. 3 Calc. Rep Lewin 231: 2 Spence 920. 4 DeG. & J. 259.

Explanation.—The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.

Illustrations.

(*a*) A bequeathes certain property to B and C on certain trusts to be executed by them or the survivor of them or the assigns of such survivor. B dies. C may bequeath the trust-property to D and E upon the trusts of A's will.

Titley v. *Wolstenholm*, 7 Beav. 436.

(*b*) A is a trustee of certain property with power to sell the same. A may employ an auctioneer to effect the sale.

(*c*) A bequeathes to B fifty houses let at monthly rents in trust to collect the rents and pay them to C. B may employ a proper person to collect these rents.

47. When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

Co-trustees cannot act singly.

Bill, s. 46. Lewin 236: Kent IV, 334: N. Y. Code, §1203.

48. Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Court of original civil jurisdiction.

Control of discretionary power.

Bill, s. 47. N. Y. Code, § 1204: Lewin 530, 531: 2 Spence 87: Kerr, *Injunctions*, 461: *Re Hodges*, Chan. D. 754.

49. In the absence of express directions to the contrary contained in the instrument of trust, or of a contract to the contrary entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust.

Trustee may not charge for services.

Bill, s. 48. Lewin, 253, 258, 540, 542: 2 Spence 946: 1. W. & T. 251: 6 Beng. 278.

Nothing in this section applies to any Official Trustee, Administrator General, Public Curator or person holding a certificate of administration.

As to them, see Acts XVII of 1864, II of 1874, XX of 1858 and XX of 1864.

50. A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

Trustee may not use trust-property for his own profit.

Bill, s. 49. N. Y. Code, § 1178.

51. No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same, or any interest therein, on his own account or as agent for a third person.

Trustee for sale or his agent may not buy.

Bill, s. 50. Lewin 438, 440.

52. No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or

Trustee may not buy beneficiary's interest without permission,

Bill, s. 51. *Contra* Lewin 441: 2 Spence 943, 944: Dart 43: Rule does not

apply to passive trustees: *Pooley* v. *Quilter*, 4 Drew. 189: Dart 44.

become mortgagee or lessee of the trust-property or any part thereof, and such permission shall not be given unless the purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

Dart 34.

Trustee for purchase.

And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for his beneficiary may buy it, or obtain a mortgage or lease of it, for himself.

Bill, s. 52. Lewin 298.

Co-trustees may not lend to one of themselves.

53. A trustee or co-trustees whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one of themselves.

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

Bill, s. 53. 1 Spence 496.

Rights to rents and profits.

54. The beneficiary has a right to the rents and profits of the trust-property, and, where he is exclusively interested in the trust-property and competent to contract, he may require the trustee to transfer the possession of the property to him or to such person as he directs. But where other persons are also interested therein, the Court may, in its discretion, direct, either that the trustee shall remain in possession of the trust-property, or that it shall be transferred to the beneficiary, under such conditions and restrictions as the Court in each case thinks fit.

Lewin 576, 585: 3 Beng. A. C. J. 409: 3 Beng. O. C. J. 92.

Right to transfer of possession.

Bill, s. 54. Lewin 589: Act I of 1877 s. 12, cl. (*a*).

Right to specific execution.

55. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest;

and where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract, and all of one mind, he or they may require the trustee to stay execution and transfer the possession of the trust-property: provided that, where the trust is to sell immoveable trust-property and the proceeds are to be divided amongst several persons, particular sharers cannot elect that their own respective undivided shares shall not be sold.

Right to compel transfer of possession.

Bill, s. 67.

Stanley v. *Stanley*, L. R. 7 Ch. D. 589.

Nothing in the second clause of this section applies to property transferred or bequeathed for the benefit of a married woman so that she shall not have power to deprive herself of her beneficial interest.

Illustrations.

(*a*) Certain Government securities are given to trustees upon trust to accumulate the interest until A attains the age of 24, and then to transfer the gross amount to him. A on attaining majority may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.

(*b*) A bequeathes Rs. 10,000 to trustees upon trust to purchase an annuity for B, who has attained his majority and is otherwise competent to contract. B may claim the Rs. 10,000. Lewin 590.

(*c*) A transfers certain property to B and directs him to sell or invest it for the benefit of C, who is competent to contract. C may elect to take the property in its original character.

Right to inspect and take copies of instrument of trust, accounts, &c.

56. The beneficiary has a right as against the trustee and all persons claiming under him with notice of the trust to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust-property, the accounts of the trust-property and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty. Bill, s. 55. *Exp. Holdsworth*, 4 Bing. N. C. 386: Lewin 582.

Right to transfer beneficial interest.

57. The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest: Bill, s. 56. Lewin 593.

Provided that when property is transferred or bequeathed for the benefit of a married woman so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorise her to transfer such interest during her marriage.

Right to sue for execution of trust.

58. Where no trustees are appointed or all the trustees die, disclaim or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee. Bill, s. 57. N. Y. Code, § 1215.

Right to proper trustees.

59. The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons and by a proper number of such persons. Bill, s. 58. Lewin 718.

Explanation I.—The following are not proper persons within the meaning of this section:— Lewin 32—39, 718.

A person domiciled abroad: an alien enemy a person having an interest inconsistent with that of the beneficiary: a person in insolvent circumstances; and, unless the personal law of the beneficiary provides otherwise, a married woman and a minor.

Explanation II.—When the administration of the trust involves the receipt and custody of the money, the number of trustees should be two at least.

Illustrations.

(*a*). A, one of several beneficiaries, proves that B, the trustee, has improperly disposed of part of the trust-property, or that the property is in danger from Bs being in insolvent circumstances, or that he is incapacitated from acting as trustee. A may obtain a receiver of the trust-property.

Brown v. *Higgs*, 8 Ves. 561.

(*b*) A bequeathes certain jewels to B in trust for C. B dies during A's lifetime; then A dies. C is entitled to have the property conveyed to a trustee for him.

(*c*) A conveys certain property to four trustees in trust for B. Three of the trustees die. B may institute a suit to have three new trustees appointed in the place of the deceased trustees.

(*d*) A conveys certain property to three trustees in trust for B. All the trustees disclaim. B may institute a suit to have three trustees appointed in place of the trustees so disclaiming.

(*e*). A, a trustee for B, refuses to act, or goes to reside permanently out of British India, or is declared an insolvent, or compounds with his creditors, or suffers a co-trustee to commit a breach of trust. B may institute a suit to have A removed and a new trustee appointed in his room.

Bill, s. 60. Lewin 724: Act I of 1877, s. 54. Kerr 170.

60. Right to compel to any act of duty. The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust.

Illustrations.

(*a*) A contracts with B to pay him monthly Rs. 100 for the benefit of C. B writes and signs a letter declaring that he will hold in trust for C the money so to be paid. A fails to pay the money in accordance with his contract. C may compel B, on a proper indemnity, to allow C to sue on the contract in B's name.

Act I of 1877, s. 64, ill. (*f*).

(*b*) A is trustee of certain land, with a power to sell the same and pay the proceeds to B and C equally. A is about to make an improvident sale of the land. B may sue on behalf of himself and C for an injunction to restrain A from making the sale.

Bill, s. 61. 1 W. & T. L. C. 172: Lewin 444.

61. Wrongful purchase by trustee. Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have the property declared subject to the trust or re-transferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice of the trust, by such person. But in such case the beneficiary must repay the purchase-money paid by the trustee, with interest and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must (*a*) account for the nett profits of the property, (*b*) be charged with an occupation-rent, if he has been in actual possession of the property, and (*c*) allow the beneficiary to deduct a proportionate part of the purchase money, if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

(*a*) impairs the rights of lessees and others who, before the institution of a suit to have the property declared subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser; or

(*b*) entitles the beneficiary to have the property declared subject to the trust or retransferred where he, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

62. Where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust.

Bill, s. 62. Lewin 728, 729, 730: 6 Bomb. O. C. J. 59: I. L. R. 1 Bomb. 237: 4 D. M. G. 372; Lewin 762: Dart 939: Smith, § 3110.

Following trust-property— into the hands of third persons;

Where the trustee has disposed of trust-property, and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

into that into which it has been converted.

Exception 1.—Nothing in this section entitles the beneficiary to any right in respect of property in the hands of—

As to moveables, see Act IX of 1872. s. 108.

(*a*) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or

5 W. R. 120: W. R. 1864, p. 225.

(*b*) a transferee for consideration from such a transferee.

A judgment-creditor attaching trust-property is not a transferee for consideration within the meaning of this exception.

Brace v. *Duchess of Marlborough*, 2 P. W. 491, and see Story, § 977.

Exception II.—Nothing in this section applies to money, currency-notes and negotiable instruments in the hands of a *bonâ fide* holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or the Transfer of Property Act, section 136.

Illustrations.

(*a*) A, a trustee for B of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land. B is entitled to the land.

(*b*) A, a trustee, wrongfully purchases land, in his own name, partly with his own money, partly with money subject to a trust for B. B is entitled to a charge on the land for the amount of the trust-money so misemployed.

Lewin 764.

63. Where a trustee wrongfully sells or otherwise transfers trust-property and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

Bill, s. 63, *Kenneddy* v. *Daly*, 1 Sch. & Lef. 379.

Acquisition by trustee of trust-property wrongfully converted.

64. Where a trustee wrongfully sells trust-property and employs the proceeds in trade or business, the beneficiary may, at his option, charge him either with the principal-money and the actual profits arising from such employment or with the principal-money and compound interest.

Bill, s. 64: Lewin 312: *Docker* v. *Somes*, 2 Myl. & K. 655: *Vyse* v. *Foster*, L. R. 8 Ch. 309: Lewin 314: Seton 478.

Wrongful employment of trust-funds in trade.

65. Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

Bill, s. 65. Lewin 273, 764. *cf.* Contract Act, s. 157. Underhill, Art. 68.

Right in case of blended property.

Bill, s. 66. Pollock, Ptp. § 25, altered as to notice.

66. If a partner, being a trustee, wrongfully employs trust-property in the business or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

Wrongful employment by partner-trustee of trust-property for partnership purposes.

The partners having such notice are jointly and severally liable for the breach of trust.

Illustrations.

Lewin 255, 764.

(*a*) A and B are partners. A dies, having bequeathed all his property to B in trust for Z, and appointed B his sole executor. B, instead of winding up the affairs of the partnership, retains all the assets in the business. Z may compel him, as partner, to account for so much of the profits as are derived from A's share of the capital. B is also answerable to Z for the improper employment of A's assets.

Flockton v. *Bunning*, 8 Ch. 323 n.: Pollock, Ptp. p. 90.

(*b*) A, a trader, bequeathes his property to B in trust for C, appoints B his sole executor, and dies. B enters into partnership with X and Y in the same trade and employs A's assets in the partnership-business. B gives an indemnity to X and Y against the claims of C. Here X and Y are jointly liable with B to C, as having knowingly become parties to the breach of trust committed by B.

Bill, s. 68. *Raby* v. *Ridehalgh*, 7 D. M. G. 104. Lewin 777: See sec. 39 *supra*.

67. Where one of several beneficiaries—

Liability of beneficiary joining in breach of trust.

(*a*) joins in committing a breach of trust; or

(*b*) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries; or

(*c*) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries; or

(*d*) has deceived the trustee and thereby induced him to commit a breach of trust,

the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

Nothing in this section applies to property transferred or bequeathed for the benefit of a married woman so that she shall not have power to deprive herself of her beneficial interest.

Bill, s. 69.

68. Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

Rights and liabilities of beneficiary's transferee.

CHAPTER VII.

Of vacating the Office of Trustee.

Bill, s. 70.

69. The office of a trustee is vacated by his death or by his discharge from his office.

Office how vacated.

Discharge of trustee.

Bill, s. 71. Spence 920.

70. A trustee may be discharged from his office only as follows:—

(*a*) by the extinction of the trust;

(*b*) by the completion of his duties under the trust;

(*c*) by such means as may be prescribed by the instrument of trust;

(*d*) by appointment under this Act of a new trustee in his place;

(*e*) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries, being competent to contract; or

(*f*) by the Court to which a petition for his discharge is presented under this Act.

Bill, s. 72. Lewin 572, 574.

Petition to be discharged from trust.

71. Notwithstanding the provisions of section eleven, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office; and if the Court finds that there is sufficient reason for such discharge, it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

See *Ardill* v. *Savage*, 1 Ir. Eq. Rep. 79, as to capricious retirement.

Bill, s. 73. Act XXVIII of 1866, s. 34. 23 & 24 Vic., c. 145, s. 27. *Re Roche*, Dr. and War. 287: Lewin 466, 467.

Appointment of new trustees on death, &c.

72. Whenever any person appointed a trustee disclaims, or any trustee dies or is for a continuous period of six months absent from British India, or leaves British India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes in the opinion of a principal Civil Court of original jurisdiction unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(*a*) the person nominated for that purpose by the instrument of trust (if any), or

5 Beng. 184.

(*b*) if there be no such person, or no such person able and willing to act, the author of the trust, if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or the retiring trustees, if they all retire simultaneously, or the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

The Official Trustee may, with his consent and by the order of the Court, be appointed under this section in any case in which only one trustee is to be appointed, and such trustee is to be the sole trustee.

For the purpose of this section, any refusing or retiring trustee shall, if willing to act in the execution of the power, be considered a continuing trustee.

Bill, s. 74. Qy. Insolvent trustee, 32 & 33 Vic., c. 71, s. 117.

Appointment by Court.

73. Whenever any such vacancy or disqualification occurs, and it is found impracticable to appoint a new trustee under section seventy-two, the beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of

trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly.

Lewin 720; Smith, § 3153: 7 Hare 106: Bill, s. 59.

Rule for selecting new trustees.

In appointing new trustees, the Court shall have regard (*a*) to the wishes of the author of the trust, as expressed in, or to be inferred from, the instrument of trust, (*b*) to the wishes of the person, if any, empowered to appoint new trustees, (*c*) to the question whether the appointment will promote or impede the execution of the trust, and (*d*) where there are more beneficiaries than one, to the interests of all such beneficiaries.

Re Tempest, L. R. 1 Ch. Ap. 84.

Bill, s. 73, paras. 3 and 4.

Vesting of trust-property in new trustees.

74. Whenever any new trustee is appointed under section seventy-two or section seventy-three, all the trust-property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require.

Powers of new trustees.

Every new trustee so appointed, and every trustee appointed by a Court either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

Bill, s. 75. N. Y. Code, § 1214. As to discretion of surviving trustee, L. R. 11 Eq. 439. 2 Spence.

Survival of trust.

75. On the death or discharge of one of several co-trustees, the trust survives, and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

CHAPTER VIII.

Of the Extinction of Trusts.

Bill, s. 76. N. Y. Code, § 1208 altered: *Fifth* v. *Cartland*. 34 L. J. Ch. 301.

Trust how extinguished.

76. A trust is extinguished—

(*a*) when its purpose is completely fulfilled; or

(*b*) when its purpose becomes unlawful; or

(*c*) when the fulfilment of its purpose becomes impossible, by destruction of the trust-property, or otherwise; or

(*d*) when the trust, being revocable, is expressly revoked.

Bill, s. 77. N. Y. Code, § 1209, altered: *Rycroft* v. *Christie*, 3 Beav. 238.

Revocation of trust.

77. A trust constituted by will may be revoked at the pleasure of the testator.

A trust otherwise constituted can be revoked only—

Jijibhai v. *Sonabhai*, Bom. 139. N.-W. P. 1870, p. 420.

(*a*) where all the beneficiaries are competent to contract—by their consent; or

(*b*) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust.

Illustration.

8 Chan. D. 749.

A conveys property to B in trust to sell the same and pay out of the proceeds the claims of A's creditors. A reserves

no power of revocation. If no communication has been made to the creditors, A may revoke the trust. But if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

Revocation not to defeat what trustees have duly done.

78. No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust. New. Lewin 468.

CHAPTER IX.

Of Certain Obligations in the Nature of Trusts.

Where obligation in nature of trust is created.

79. An obligation in the nature of a trust is created in the following cases. Bill, s. 78.

Where it appears that transferor did not intend to dispose of beneficial interest.

80. Where the owner of property transfers or bequeathes it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein. In this case the transferee or legatee must hold such property for the benefit of the owner or his legal representative. Bill, s. 78, cl. (*a*). Lewin 132: 2 Spence 199.

Illustrations.

(*a*) A conveys land to B without consideration and declares no trust of any part. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the land. B holds the land for the benefit of A.

(*b*) A conveys to B two fields, Y and Z, and declares a trust of Y, but says nothing about Z. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in Z. B holds Z for the benefit of A.

(*c*) A transfers certain stock into the joint names of himself and B. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the stock during his life. A and B hold the stock for the benefit of A during his life. *Fowkes* v. *Pascoe*, L. R. 10. Ch. App. 343 351.

(*d*) A makes a gift of certain land to his wife B. She takes the beneficial interest in the land free from any trust in favour of A, for it may be inferred from the circumstances that the gift was for B's benefit.

Transfer to one for consideration paid by another.

81. Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. Bill, s. 78, cl. (*d*); s. 81.

Trust incapable of execution or executed without exhausting trust-property.

82. Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative. Bill, s. 78, cl. (*b*). Smith § 715: Jarman, Wills, i. 354. No saving of charitable trust. I. L. R., 2 Bomb. 410.

Illustrations.

Lewin 134: Spence 33.

(*a*) A conveys certain land to B—

"upon trust," and no trust is declared; or

"upon trusts to be thereafter declared," and no such declaration is ever made; or

upon trusts that are too vague to be executed; or

upon trusts that become incapable of taking effect:

In each of these cases B holds the land for the benefit of A.

(*b*) A transfers Rs. 10,000 in the four per cents. to B in trust to pay the interest annually accruing due to C for her life. A dies. Then C dies. B holds the fund for the benefit of A's legal representative.

Contra in England. But see Lewin 148.

(*c*) A conveys land to B upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes and the other for the maintenance of the worship of an idol. B sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. B holds the first moiety and the part unapplied of the second moiety for the benefit of A or his legal representative.

(*d*) A bequeathes Rs. 10,000 to B, to be laid out in buying land to be conveyed for purposes which either wholly or partially fail to take effect. B holds for the benefit of A's legal representative the undisposed of interest in the money or land if purchased.

Bill, s. 78, cl. (*c*). L. R. 9 Eq. 475: 16 Eq. 283.

Transfer for illegal purpose.

83. Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

Transfer of Property Bill, s. 9: Kent IV, 332: Smith, § 711.

Bequest for illegal purpose.

84. Where a testator bequeathes certain property upon trust and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Bequest of which revocation is prevented by coercion.

Where property is bequeathed and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

See Act I of 1877, s. 35.

Transfer pursuant to rescindible contract.

85. Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor subject to repayment by the latter of the consideration actually paid.

Bill, s. 78, cl. (*e*). 4 Mad. 88: 6 Mad. 474: 2 Ind. Jur. O. s. 7: 13 Eliz, c. 5. Qy. as to marriage, 6 Ch. L D 29.

Transfer in fraud of transferor's creditors.

86. Where the effect of a transfer of property is to defraud or delay the present or future creditors of the transferor, or co-owners or other persons interested in such property, and the transfer is gratuitous or the transferee has notice of the intended fraud, the transferee must hold the property for their benefit to the extent necessary to satisfy their just demands.

Debtor becoming creditor's representative.

87. Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein.

Bill, s. 78, cl. (*f*). See sec. 13, ill. (*a*), *supra*.

Advantage gained by fiduciary.

88. Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

Bill, s. 78, cl. (*g*). Act I of 1877, s. 3, ills. (*b*), (*c*), (*e*), (*f*): L. R. 2 Ind. App. 18: 2 Spence 299: Lewin 165, 171: Story, § 323.

Illustrations.

(*a*). A, an executor, buys at an undervalue from B, a legatee, his claim under the will. B is ignorant of the value of the bequest. A must hold for the benefit of B the difference between the price and value.

(*b*). A, a trustee, uses the trust-property for the purpose of his own business. A holds for the benefit of his beneficiary the profits arising from such user.

(*c*). A, a trustee retires from his trust in consideration af his successor paying him a sum of money. A holds such money for the benefit of his beneficiary.

(*d*). A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership.

(*e*). A, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. A holds the lakh for the benefit of the partnership.

Fawcett v. *Whitehouse* 1 R. & M. 132.

(*f*). A and B are partners. A dies. B, instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital.

(*g*). A, an agent employed to obtain a lease for B, obtains the lease for himself. A holds the lease for the benefit of B.

(*h*). A, a guardian, buys up for himself incumbrances on his ward B's estate at an undervalue, A holds for the benefit of B the incumbrances so bought, and can only charge him with what he has actually paid.

Advantage gained by exercise of undue influence.

89. Where by the excercise of undue influence any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration or with notice that such influence has been exercised must hold the advantage for the benefit of the person whose interests have been so prejudiced.

Advantage gained by qualified owner.

90. Where a tenant for life, co-owner, mortgagee, or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an

Bill, s. 78, cl. (*h*). Lewin 166, 725: 2 Spence 299, 301: Act I of 1877, s. ill. (*d*). cf. 5 Beng. 458, mortgagee buying equity of redemption,

indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

Illustrations.

(*a*) A, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.

(*b*) A village belongs to a Hindú family. A, one of its members, pays nazráná to Government and thereby procures his name to be entered as the inámdár of the village. A holds the village for the benefit of himself and the other members.

10 Moo. I. A. 322: 14 Moo. I. A. 305.

(*c*) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage, and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A.

Bill, s. 78, cl. (*i*). 2 Spence 195: Lewin 128, 729: Smith § 725: Act I of 1877, s. 3, ills. (*g*), (*h*).

Property acquired with notice of existing contract.

91. Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

Bill, s. 78, cl. (*j*). Smith § 723.

Purchase by person contracting to buy property to be held on trust.

92. Where a person contracts to buy property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

Story Eq. Jur. § 378.

Advantage secretly gained by one of several compounding creditors.

93. Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.

Bill, s. 78, cl. (*k*), *e.g.*, Punjab co-sharer absentees.

Constructive trusts in cases not expressly provided for.

94. In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

Illustrations.

2 Spence 297.

(*a*) A, an executor, distributes the assets of his testator B to the legatees without having paid the whole of B's debts. The legatees hold for the benefit of B's creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(*b*) A by mistake assumes the character of a trustee for B, and under colour of the trust receives certain monies. B may compel him to account for such monies.

(*c*) A makes a gift of a lákh of rupees to B, reserving to himself, with B's assent, power to revoke at pleasure the gift as to Rs. 10,000. The gift is void as to Rs. 10,000, and B holds that sum for the benefit of A.

Bill, s. 79.

Obligor's duties, liabilities and disabilities.

95. The person holding property in accordance with any of the preceding sections of this chapter must, so far as may be, per-

form the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it:

Provided that, (*a*) where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill, and loss of time in such cultivation or employment; and (*b*), where he holds the property by virtue of a contract with the person for whose benefit he holds it, or with any one through whom such person claims, he may, without the permission of the Court, buy or become lessee or mortgagee of the property or any part thereof.

Brown v. *Litton*.

Underhill, p. 128.

Saving of rights of *bonâ fide* purchasers.

96. Nothing contained in this chapter shall impair the rights of transferees in good faith for consideration, or create an obligation in evation of any law for the time being in force.

Bill, s. 80. L. R. 8 Ch. 747.

THE SCHEDULE.

STATUTES.

Number and year.	Short title.	Extent of repeal.
13 Eliz., c. 5	An Act against fraudulent deeds, gifts, alienations, etc.	The whole.
29 Car. II, c. 3	The Statute of Frauds.	Sections 7, 8, 9, 10 and 11.

ACTS.

Number and year.	Short title.	Extent of repeal.
XXVIII of 1866	The Trustees and Mortgagees' Powers Act, 1866.	Sections 2, 3, 4, 5, 32, 33, 34, 35, 36, and 37. In sections 39 and 43, the word "trustee" wherever it occurs, and in section 43, the words "management or" and "the trust-property or."
I of 1877	The Specific Relief Act, 1877.	In section 12, the first Illustration.

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